Supreme Court of the United States

October Term, 1945

Nos. 680 and 681

INTERNATIONAL HARVESTER COMPANY, *Appellant*,

vs. (No. 680)

WISCONSIN DEPARTMENT OF TAXATION, *Appellee*.

MINNESOTA MINING AND MANUFACTURING COMPANY, *Appellant*,

vs. (No. 681)

WISCONSIN DEPARTMENT OF TAXATION, *Appellee*.

APPEALS FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF OF APPELLEE

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IN THE

Supreme Court of the United States

October Term, 1943

Nos. 620 and 621

INTERNATIONAL HARVESTER COMPANY, *Appellant*, *vs.* WISCONSIN DEPARTMENT OF TAXATION, *Appellee.*	(No. 620)
MINNESOTA MINING AND MANUFACTURING COMPANY, *Appellant*, *vs.* WISCONSIN DEPARTMENT OF TAXATION, *Appellee.*	(No. 621)

APPEALS FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF OF APPELLEE

The appellee is the same in the above entitled cases and this brief is submitted on its behalf as a joint brief for both cases.

Although the detailed facts are different in each case by virtue of there being separate appellant taxpayers and the conduct by each of its respective business and affairs, yet the same basic factual situation exists in both cases.

To the extent there is any difference in the detailed facts material to the questions involved the same will be separately treated.

The Supreme Court of Wisconsin heard and decided the cases at the same time, and upon the same grounds, its decision in the *International Harvester Co.* case, No. 620 here, being expressly made the basis of, and incorporated by reference in, its decision in the *Minnesota Mining & Mfg. Co.* case, No. 621 here.

The questions of law here presented by the appellants are essentially the same and separate briefs by appellee would be repetitious. To the extent any arguments are made not common to both they will be dealt with specifically.

The facts relating to each case will be hereinafter separately stated. In other respects, the contents hereof, except as otherwise specifically stated, apply equally to both cases.

OPINIONS BELOW

The opinion of the Supreme Court of Wisconsin in Case No. 620 (R. 60-69) is reported *International Harvester Co. v. Dept. of Taxation* (June 16, 1943) 243 Wis. 198, 10 N. W. (2) 169, and an opinion on denial of rehearing (R. 71) on September 14, 1943 is not as yet printed in the official reports but is reported 11 N. W. (2) 95.

The opinion of the Supreme Court of Wisconsin in Case No. 621 (R. 102-105) is reported *Minnesota Mining & Mfg. Co. v. Dept. of Taxation,* (June 16, 1943) 243 Wis. 211, 10 N. W. (2) 174. But it can only and *must* be read and considered in conjunction with that court's opinion rendered at the same time in Case No. 620 reported as stated above *International Harvester Co. v. Dept. of Taxation,* (June 16, 1943) 243 Wis. 198, 10 N. W. (2) 169. Likewise an opinion on denial of a rehearing in this case No. 621 (R. 106-107) on September 14, 1943 is not as yet

printed in the official reports but is reported 11 N. W. (2) 96.

Jurisdiction

Judgment of the Supreme Court of Wisconsin both cases was entered June 16, 1943. (No. 620, R. 60; No. 621, R. 102) Petition for allowance of appeal to this Court was filed and granted December 11, 1943 in both cases. (No. 620, R. 1-3; No. 621, R. 1-3). Probable jurisdiction was noted February 28, 1944 in both cases. (No. 620, R. 73; No. 621, R. 110)

Jurisdiction of this Court is rested on Section 237 (a) of the Judicial Code.

QUESTION PRESENTED

Whether the imposition of taxes by the Wisconsin Privilege Dividend Tax Law, Section 3 of Chapter 505 of the Laws of Wisconsin of 1935, upon foreign corporations licensed to do business in Wisconsin offends the due process provisions of the Fourteenth Amendment?

Statutes Involved

The Wisconsin Privilege Dividend Tax Law, Section 3 of Chapter 505 of the Laws of Wisconsin of 1935, effective on its publication on September 26, 1935, and as amended by Chapter 552 of the Laws of Wisconsin of 1935 is printed in the Appendix to this brief.

While originally this tax was operative only to July 1, 1937, it has been subsequently re-enacted in 1937, 1939, 1941 and 1943 by the following Acts of the Wisconsin legislature and is now operative:

(1) Section 37, Chapter 309 of the Laws of Wisconsin of 1937, (enacted and effective on its publica-

tion June 30, 1937) extended its operation to July 1, 1939.

(2) Section 1 of Chapter 198 of the Laws of Wisconsin of 1939 (enacted and effective on its publication on June 30, 1939) extended its operation to July 1, 1941, and also increased the rate from 2½% to 3% thereafter.

(3) Section 3 of Chapter 63 of the Laws of Wisconsin of 1941 (enacted and effective upon its publication April 30, 1941) extended its operation to July 1, 1943.

(4) Section 2 of Chapter 367 of the Laws of Wisconsin of 1943 (enacted and effective on its publication June 30, 1943) extended its operation to July 1, 1945 and also changed the purpose for which such taxes shall be used from general state expenditure, providing:

> "* * * rehabilitation for returning veterans of World War II, construction of improvements at state institutions and other state property, and postwar public works projects to relieve postwar unemployment."

This is the identical Wisconsin tax statute previously considered and held to be valid by this Court in *Wisconsin v. J. C. Penney Co.*, (1940) 311 U. S. 435, 61 S. Ct. 246, 85 L. ed. 267; *Wisconsin v. Minnesota Mining & Mfg. Co.*, (1940) 311 U. S. 452, 61 S. Ct. 253, 85 L. ed. 274; *Wisconsin v. F. W. Woolworth Co.*, (1940) 311 U. S. 622, 61 S. Ct. 395, 85 L. ed. 395.

STATEMENT OF THE CASES

Summary of Facts in International Harvester Co. Appeal, No. 620.

The facts are not in dispute. The appellant, International Harvester Company, is a New Jersey corporation, having its principal office in Hoboken, New Jersey. Its general executive offices are in Chicago, Illinois. It has

manufacturing plants and sales branches in many states. It has done business in Wisconsin and been duly licensed to do so since 1920. The meetings of its board of directors at which dividend resolutions were adopted and all acts in paying dividends took place in Chicago where its treasury departments drew and mailed out checks on appellant's bank accounts in Chicago and New York to its stockholders numbering more than 32,000 who were in every state of the United States and in many foreign countries. Less than 2% of its stockholders were residents of Wisconsin.

The Wisconsin Privilege Dividend Tax Law was enacted and went into effect on September 26, 1935. From December 2, 1935 to October 15, 1937 the appellant International Harvester Co., paid numerous dividends totalling $39,028,188.22, but did not pay any privilege dividend tax thereon. Such dividends were charged to surplus which resulted from and reflected the accumulated net profits and income from property wherever located and business wherever transacted.

At the end of the year 1934, the amount of surplus accumulated from Wisconsin earnings and constituting Wisconsin surplus on the basis of the formulae and method of computation prescribed by Chapter 71, Wisconsin Statutes, was $803,780.72. The amount attributable to Wisconsin as of December 31, 1935, was $2,227,499.03. The Wisconsin surplus as of October 31, 1936, was $2,608,908.26.

On December 2, 1937 the Wisconsin Tax Commission (predecessor to the appellee Wisconsin Department of Taxation) notified the appellant of an assessment of privilege dividend taxes against it of $68,838.49, exclusive of penalties and interest, computed upon the basis of the statutory presumption that the dividends were paid out of the previous year's earnings. Subsequent thereto, and because of the decision by the Supreme Court of Wisconsin in *J. C. Penney Co. v. Tax Comm.*, (1941) 238 Wis. 69, 298 N. W. 186, upon the remand from this Court in the prior cases

Wisconsin v. J. C. Penney Co., (1940) 311 U. S. 435, 61 S. Ct. 246, 85 L. ed. 267; *Wisconsin v. Minnesota Mining & Mfg. Co.*, (1940) 311 U. S. 452, 61 S. Ct. 253, 85 L. ed. 274; *Wisconsin v. F. W. Woolworth Co.*, (1940) 311 U. S. 622, 61 S. Ct. 395, 85 L. ed. 395, the appellee, Wisconsin Department of Taxation, followed the directions of the Supreme Court in respect to the computation of the tax and recomputed such taxes at $53,713.29, exclusive of penalties and interest.

There is a stipulation in this case to the effect that, assuming the law to be valid and the method of computation authorized, the amount of the taxes as computed is correct. (Case No. 620, R. 30 and 31) The attention of the Court is particularly directed to this stipulation because as will be discussed later, notwithstanding this stipulation counsel for the appellant International Harvester Co. make arguments that are foreclosed by and contrary to this stipulation which they entered into.

Summary of Facts in Minnesota Mining & Mfg. Co. Appeal, No. 621

The facts are identical with those presented in the prior case of *State of Wisconsin v. Minnesota Mining & Mfg. Co.*, (1940) 311 U. S. 452, 61 S. Ct. 253, 85 L. ed. 274, with the exception that the taxes are here computed by using the surplus analysis method ordered by the Wisconsin Supreme Court in its decision on remand from this Court, with the result that the taxes are less in amount than if computed as in the prior case. The assessment here involved also includes not only the year 1936, which was the only year covered by the prior case, but also the subsequent years 1937 to 1940, both inclusive.

The facts are not in dispute and are as stated by the Supreme Court of the State of Wisconsin in its opinion

in this case, *Minnesota Mining & Mfg. Co. v. Dept. of Taxation,* (June 16, 1943) 243 Wis. 211, at 213, 10 N. W. (2) 174, as follows: (Case No. 621, R. 102-104)

> "The facts in this case are not in substantial dispute. Appellant is a Delaware corporation, with its principal office and place of business in St. Paul, Minnesota. It operates a factory at Wausau, Wisconsin, manufacturing roofing granules. This factory began manufacturing operations in 1930. Sales are made through an office in Chicago but orders are confirmed at the St. Paul office. When products so manufactured are sold, the remittances are made directly to the home office at St. Paul, and the funds from such sales are deposited in the general account of the appellant. Pay-rolls, together with pay-checks, are prepared at the St. Paul office and drawn on a Wausau bank, and a deposit equalling the amount of the pay-roll is forwarded to the Wausau bank to cover the checks at approximately the same time that the checks representing the pay-roll are forwarded. The company reports upon a calendar year basis, closing books as of December 31, each year. It maintains one general surplus account and none of the earnings from property located, or business transacted in Wisconsin are segregated in any way. It maintains no separate balance sheet for Wisconsin operations. Dividends are declared by the Board of Directors of the company at meetings held in St. Paul; the First Trust Company of that city being the company's transfer agent. All dividends are paid to this transfer agent by check drawn upon a St. Paul bank and distributed to the stockholders by the transfer agent. Dividends are paid from surplus.

Computation of the Taxes in Both Cases.

The following excerpt from the opinion of the Supreme Court of Wisconsin in *Minnesota Mining & Mfg. Co. v. Dept. of Taxation,* (1943) 243 Wis. 211, 213, 10 N. W. (2) 174, sets forth the manner in which the taxes were computed:

"In making the assessments, the department of taxation analyzed the surplus on December 31st of the year preceding that in which a particular dividend was paid. In this analysis, the department went back to the date on which the corporation commenced doing business in Wisconsin for the purpose of determining (1) total surplus existing at that time, (2) the ratable contribution of earnings in Wisconsin to the surplus as of December 31st, prior to the declaration of the dividends. The department selected the close of the year preceding the payment of the dividend as the basis of its computations rather than the surplus at the time of the payment or receiving of the dividend, it being the view of the department that unless the corporation had closed its books and taken inventory at the time of the payment of the dividend (in which case analysis would have been made as of that time) it would be impossible to revise the surplus as of each dividend paying date. The dividends were paid out of the corporation's general account. There never was any attempt made to earmark any of the earnings coming from Wisconsin or other states, although the corporation did business in all of the other states of the Union."

ARGUMENT

Summary of Argument

PREFACE showing these appeals are rested upon a predicate that is nonexistent. In urging that there is a conflict between the decisions of this Court and of the Supreme Court of Wisconsin appellants fail to set out the express statement in the decisions here appealed from, where it unequivocally disavows any such conflict.

POINT I. NO CONFLICT EXISTS BETWEEN THE DECISIONS OF THIS COURT AND OF THE SUPREME COURT OF WISCONSIN. The latter in *State ex rel. Froedtert G. & M. Co. v. Tax Comm.* (1936) 221 Wis. 225, 265 N. W. 672 affirmed this law, and in *J. C. Penney Co. v. Tax Comm.* (1940) 233 Wis. 305, 289 N. W. 677, and companion cases, it held the tax invalid solely upon its interpretation of the applicability of *Connecticut General Life Insurance Co. v. Johnson,* (1938) 303 U. S. 77, 58 S. C. 436, 82 L. ed. 673. The decision of this Court in *Wisconsin v. J. C. Penney Co.* (1940) 311 U. S. 435, 61 S. Ct. 246, 85 L. ed. 267 clarified this point and the tax was sustained upon the same basis that the Supreme Court of Wisconsin sustained it in the instant cases. The legislative history of re-enactments of this tax law are such that the courts' interpretations became an integral part thereof, and so this tax law cannot be given any other or different operation or effect. Reliance thereon in such re-enactments in preparing and providing for fiscal affairs of the state renders it obligatory that such effect be given this law thereafter, otherwise there would be no certainty or continuity in the fiscal matters of the state.

POINT II. THIS COURT DID NOT HOLD THE TAX AN INCOME TAX AGAINST THE CORPORATION. All that this Court held in the prior cases is that the tax is one that supplements the normal state income tax, but it did not hold it to be an income tax. It rested jurisdiction to impose this tax upon that same basis that supports an income tax—namely benefits conferred by the state.

POINT III. THE SUPREME COURT OF WISCONSIN DID NOT HOLD THAT THIS TAX IS IMPOSED

UPON THE STOCKHOLDER All the Supreme Court of Wisconsin held in *Wisconsin Gas & Electric Co. v. Dept. of Taxation* (1943) 243 Wis. 216, 10 N. W. (2) 140 is that the tax does not qualify as a deduction from gross income under Section 71.03 (4) Wisconsin Statutes in computing Wisconsin income taxes, as a tax on the "property or business" producing the income subjected to such income tax: In *Blied v. Wis. Foundry & Machine Co.* (1943) 243 Wis. 221, 10 N. W. (2) 142 it merely held that, this tax law providing that the privilege dividend tax may be deducted from the dividend, it must be applied and is valid, which case was between a Wisconsin stockholder and a Wisconsin corporation.

POINT IV. THE TAX IS CLEARLY WITHIN THE TAXING JURISDICTION OF THE STATE OF WISCONSIN. Court in testing validity of a tax is not concerned with labels or words, but only practical operation of the tax. If imposed in relation to benefits conferred by the state it is within the state's jurisdiction. There is reasonable relationship between this tax and protection afforded both in earning the accumulated income used to pay the dividend and in preserving the property in Wisconsin (including a representative proportion of the company's surplus made up of accumulated earnings) in the year of declaration and payment of the dividend. Tax is measured only by the amount of dividends paid that have resulted from earnings derived from and preserved by the protection and beneficial effect of Wisconsin laws. Purpose of corporate activity in the state is to acquire and have earnings to distribute to stockholders, who are the real beneficiaries of the protection and benefits thus conferred by the state. The tax is a transfer tax—a tax on the devolution of the benefits to the intended beneficiary at the time he realizes the same. Surplus is not represented by any particular property. When a corporation with surplus does business in the state the proportionate part of the surplus derives benefit from and is protected by the law of that state during that time, regardless of when the funds or earnings therein were acquired. Benefit of doing business under a state's laws cannot be measured by *quid pro quo* concept of license fees or taxes exacted during that time or by any cost basis of governmental expenditures during that time.

Governmental operations are result of expenditures over long periods of time, in the past and spread over periods in the future. Upon principle the tax is valid whether against the corporation or against the stockholders.

POINT V. THE PRIVILEGE DIVIDEND TAX IS NOT A RETROACTIVE TAX. It imposes a present tax upon a present occurrence—a transfer taking place subsequent to and during the life of the tax law. It is entirely different even from the tax in *Welch v. Henry*, (1937) 223 Wis. 319, 271 N. W. 68, 226 Wis. 595, 277 N. W. 183, affirmed 305 U. S. 134, 59 S. Ct. 121, 82 L. ed. 87, where a tax was imposed upon dividends in a year subsequent to the year of receipt and was truly a retroactive tax. The thing there taxed had occurred before the tax law was enacted. Here the thing taxed—the transfer—is taxed in the year that it takes place. Viewed as a tax on the stockholder there is no conceivable basis for contending it is retroactive.

Preface showing these appeals are rested upon a predicate that is nonexistent but maintained by appellants through improper and unjustifiable presentation thereof

These appeals, as stated by the Supreme Court of Wisconsin in its decision in *International Harvester Co. v. Dept. of Taxation*, (June 16, 1943) 243 Wis. 198, 201, 10 N. W. (2) 169, which opinion is specifically made applicable as well to *Minnesota Mining & Mfg. Co. v. Dept. of Taxation*, (June 16, 1943) 243 Wis. 211, 10 N. W. (2) 174, are another chapter in the long history of litigation concerning the Wisconsin Privilege Dividend Tax Law, in which the controversy developed has been but a mere battle of words and labels, during which the Supreme Court of Wisconsin passed upon the constitutionality of this law and its proper construction four times and this Court has considered the matter once.

The present appeal by the Minnesota Mining & Mfg. Co. in No. 621 involves the same statute, the same tax-

payer and the same basic facts as in the prior case of *Wisconsin v. Minnesota Mining & Mfg. Co.*, (1940) 311 U. S. 452, 61 S. Ct. 253, 85 L. ed. 274, in which case and the two companion cases, *Wisconsin v. J. C. Penney Co.*, (1940) 311 U. S. 435, 61 S. Ct. 246, 85 L. ed. 267, and *Wisconsin v. F. W. Woolworth Co.*, (1940) 311 U. S. 622, 61 S. Ct. 395, 85 L. ed. 395, this Court affirmatively held that the imposition of this tax is within the taxing jurisdiction of the State of Wisconsin. The only differences between this appeal by the Minnesota Mining & Mfg. Co. in No. 621, and the prior case in this court involving this same appellant are: (1) that taxes for the subsequent years, 1937 to 1940 are also here included, and (2) the Supreme Court of Wisconsin has construed said law as to the proper method of computation of the tax, which it had not previously done when the cases were here last, because of its view as to the force of the decision in *Connecticut General Life Ins. Co. v. Johnson*, (1938) 303 U. S. 77, 58 S. Ct. 436, 82 L. ed. 673, and the method so prescribed by the Supreme Court of Wisconsin has been followed in computing the taxes here involved.

Basically the same arguments that are here made by the appellants in both cases Nos. 620 and 621 in attacking the validity of this tax law in respect to jurisdiction to tax were urged when said cases were last before this Court; again to the Supreme Court of Wisconsin upon the hearing of said cases on remand from this Court; and also when the instant companion cases were again before the Supreme Court of Wisconsin at the time it rendered its decisions in these cases, *Minnesota Mining & Mfg. Co. v. Dept. of Taxation*, (June 16, 1943) 243 Wis. 211, 10 N. W. (2) 174; *International Harvester Co. v. Dept. of Taxation*, (June 16, 1943) 243 Wis. 198, 10 N. W. (2) 169, and in the three other cases under consideration at the same time, *Wisconsin Gas & Electric Co. v. Dept. of Taxation*, (June

16, 1943) 243 Wis. 216, 10 N. W. (2) 140; *Blied v. Wisconsin Foundry & Machine Co.*, (June 16, 1943) 243 Wis. 221, 10 N. W. (2) 142, and *Montgomery Ward & Co. v. Dept. of Taxation*, (June 16, 1943) 243 Wis. 224, 10 N. W. (2) 176.

The arguments now made here by the appellants, International Harvester Co. in Case No. 620 and Minnesota Mining & Mfg. Co. in Case No. 621 are but a repetition of the same arguments that have been made to the Supreme Court of Wisconsin a number of times without success. Ever since the decision of this Court in the prior cases there has been an unsuccessful but relentless endeavor to effect the existence of a conflict between the decisions of this Court and of the Supreme Court of Wisconsin. The appellant Minnesota Mining & Mfg. Co. both on remand from this Court and subsequently has persisted in misconceiving this Court's decisions in the prior cases. It was vehemently asserted to the Supreme Court of Wisconsin upon remand *inter alia* that this Court held the tax is a supplemental income tax against the corporation and sustained it as within the taxing jurisdiction of the state solely as such; that the Supreme Court of Wisconsin had not so regarded the tax and therefore it should either adhere to its prior decisions and hold the tax invalid because this Court had sustained the tax as being totally different from what it is or hold that the tax is an income tax; and that in any event the tax is not against the corporation because of the deductibility provisions but upon the stockholders and therefore not sustained by this Court's decisions in the prior cases.

Notwithstanding all this the Supreme Court of Wisconsin sustained the tax on remand and addressed itself to construing the law as to computation of the tax. *J. C. Penney Co. v. Tax Comm.*, (1941) 238 Wis. 69, 298 N. W. 186 (upon remand). It held that the fact of payment of

the dividends from surplus rebuts the statutory presumption of payment from earnings of the most recent years because:

> "* * * When the corporation declared its dividends in 1936, it drew upon its net assets in excess of its capital (surplus) as required by the law of Delaware. Its net profits for the year 1935 are to be found in its surplus at the end of the calendar year. When the company drew upon this surplus for the payment of the dividend declared, it did not draw upon 1935 income but on its entire surplus. It must be presumed, however, that when it drew upon the surplus which contained Wisconsin income, it drew upon Wisconsin income to the extent of the proportion which Wisconsin income bore not to the income for 1935 but to the whole amount of the surplus. * * *". (p. 78)

and remanded the case for recomputation of the tax upon that basis.

Then when the instant cases, involving the *International Harvester Co.* and the *Minnesota Mining & Mfg. Co.* and the other three recent *Wisconsin Gas & Electric Co.*, *Bliel* and *Montgomery Ward & Co.* cases, came before the Supreme Court of Wisconsin, the same propositions were even more strenuously urged. The purpose in presenting them was to have a basis for contending that as an income tax against the corporation it is not sustainable under Wisconsin law and also would be invalidly retroactive, and that as a tax against the stockholders it is beyond the taxing jurisdiction of Wisconsin. Again such endeavors were of no avail and the Supreme Court of Wisconsin sustained the tax, *specifically stating* that no such conflict exists and that the fundamentals expressed in the decision of this Court in the prior cases clearly sustain the tax as valid. *International Harvester Co. v. Dept. of Taxation*, (1943) 243 Wis. 198, 10 N. W. (2) 169; *Minnesota Mining & Mfg. Co. v. Dept. of Taxation*, (1943) 243 Wis. 211, 10 N. W. (2) 174.

But, notwithstanding all this, in the Brief of Appellant in both of the appeals here it is "dogmatically" asserted that such conflict exists and the entire attack is predicated upon the existence of such a conflict. At the very outset, this postulate of the appellant is vigorously denied by appellee for the reason that no such conflict exists. This will be demonstrated later in this brief. The method by which appellants here endeavor to build up the existence of such a conflict is by taking isolated phrases and parts of the various opinions torn from their context and setting them off one against another.

In the first place, as to the value thereof, the following appears pertinent:

> "Perhaps there is no practice contributing more greatly to confusion in legal conception or more fruitful of litigation than that of wresting a line or phrase from its context in an opinion and attempting to apply it to an entirely dissimilar set of facts." *Matter of Davidson*, (1930 N. Y.) 137 Misc. 852-858.

In the second place, it is done by the appellant Minnesota Mining & Mfg. Co. in its brief not only unjustifiably, but by what would appear to be by a purposely unfair method.

At pages 13 to 19 of Brief of Appellant by counsel for Minnesota Mining & Mfg. Co. the position of the appellant in this regard is set out. It is there urged that this Court sustained this law as a supplementary income tax on the corporation; that the Wisconsin Supreme Court in its decision on remand, *J. C. Penney Co. v. Tax Comm.*, (1941) 238 Wis. 69, 298 N. W. 186, vehemently held that the tax was not an income tax on the corporation; and that the decisions of the Supreme Court of Wisconsin in that case and in the other five recent cases (which includes the decision in the instant case) in which decisions were rendered on June 16, 1943, construed this tax law so as to

now remove the basis upon which this Court upheld this tax law in the *Penney* case. It is then asserted this is true because there is a basic conflict in the construction of this law between the decision of this Court and the decisions of the Supreme Court of Wisconsin and to support this presents an excerpt from the decision of the Circuit Court for Dane County, Wisconsin, not in this case, but in the companion *International Harvester Co.* case in that court.

Then in a folded insert at page 18 counsel for the Minnesota Mining & Mfg. Co. commit what to us, especially in view of their quotation on pages 17 and 18 from the Circuit Court decision in the companion *International Harvester* case, is a most improper and unfair presentation. In this folded insert appellant's counsel sets forth in columnar form detached sentences and quotations from various opinions, but wholly omits any quotation from the decision of the Supreme Court of Wisconsin in *International Harvester Co. v. Dept. of Taxation*, (1943) 243 Wis. 198, 10 N. W. (2) 169, which opinion is specifically referred to and incorporated in the opinion by the Supreme Court of Wisconsin in the instant case involving the Minnesota Mining & Mfg. Co. In fact the importation of that opinion into the decision in this case and the failure to quote therefrom means that the comparison in the folded insert does not include the very decision in the case from which the appeal here is taken.

This in and of itself standing alone might not be serious, but for the fact that in *International Harvester Co. v. Dept. of Taxation*, (1943) 243 Wis. 198, 10 N. W. (2) 169, at page 205, the Supreme Court of Wisconsin specifically addressed itself to this point at a time when the identical arguments (including a columnar comparison of almost the same content) that are now made here as the basis of the appellant's present attack on the constitu-

tionality of this statute had been made to it, and said at pages 205 and 206:

> "* * * The latter point need not be elaborated in this portion of the opinion. From the briefs in this case, and the memorandum of the trial court, it appears to be concluded that we have here what the trial court designates an 'immaculate dilemma'; that the supreme court of the United States has held this to be an income tax, and that as such it is invalid under the Wisconsin constitution; that the supreme court of Wisconsin, upon remand, has persisted in designating it a privilege tax in which case the privilege being wholly exercised outside of the state, it is unconstitutional under the federal constitution.
>
> "We see no such dilemma. As we read the opinion of the United States supreme court, we discover no attempt by the court to usurp the function of this court so far as construing or labeling this tax is concerned. What the United States supreme court has done is, (1) to state the factual basis upon which this law must be treated as constitutional in so far as the jurisdiction of Wisconsin to levy it is concerned, and (2) to hold that given the factual basis, the law is constitutional in this aspect, regardless of the designation given it by this court. In other words, the federal supreme court has established the jurisdictional fact which is that the corporation paid the dividends in whole or in part out of property located in this state or business transacted here. If the term 'jurisdictional fact' must hereafter be relegated to the limbo of outmoded terms, the basis of Wisconsin's power to tax is the fact that it has given its protection and the benefits of government to corporate activities in Wisconsin and that profits from these activities are traceable to the fund from which dividends are paid. So far as the constitutional aspects of the cases are concerned, the federal supreme court has reduced the privilege features of the tax to mere conditions or contingencies, upon the happening of which the tax accrues.
>
> "This being true; we perceive no conflict so long as we are talking about the power of Wisconsin to tax as against the contention that the subject of the tax is beyond her borders, and hence, beyond her jurisdic-

> tion. It makes no difference what this court calls the tax. It may, for other than constitutional reasons, be important to designate the tax a privilege tax, but the label has no bearing upon the controversy here. We adhere to our determination upon remand of the *Penney Case, supra*, that this is a privilege tax and that we are bound to accept the mandate of the United States supreme court that this constitutional justification from the standpoint of Wisconsin's power to tax is the fact of net earnings in Wisconsin traceable to the fund distributed by the dividend. Under the circumstances, we do not propose to re-examine contentions heretofore made and impliedly overruled that the law is void under the Wisconsin constitution. The constitutional question considered material and decided by this court in the original *Penney Case* involved the federal constitution and has been answered by the United States supreme court. We consider the matter to be closed."

This omission in this line of argument is unpardonable. Not only does this omitted quotation demonstrate that the Supreme Court of Wisconsin is in perfect accord with this Court upon the jurisdictional question and has in no manner construed this statute so as to give rise to any such conflict as is asserted by the appellants, but a reading of the opinions in *toto* from which the handpicked snatches set forth in the folded insert are lifted shows that the import of all of them is that the basic fundamentals upon which jurisdiction to impose this tax is sustained are the same in this Court and in the Supreme Court of Wisconsin.

As previously indicated this last will be elaborated on later in this brief, but at the outset it is desired to show the utter lack of merit in appellants' thesis, which must be apparent to the appellants' counsel, otherwise it is unexplainable why this positive statement by the Supreme Court of Wisconsin squarely on the point is neither included in the insert following page 18 in the Brief of Appellant Minnesota Mining & Mfg. Co. nor anywhere else either in the Brief of Appellant Minnesota Mining & Mfg. Co. nor

in the Brief of Appellant International Harvester Co.

This matter has been dwelt upon at some length because it not only is most unfair to this Court and to the Supreme Court of Wisconsin, but a serious matter that may not be passed off lightly when made the basis of an attack upon a tax law that is of such importance in the fiscal affairs of the State of Wisconsin. Reference to the official records and the published official Reports of the Wisconsin Department of Taxation shows the following as to just how serious it is:

Calendar Year	*Privilege Dividend Tax Collected*
1935 (2½ months)	$ 20,732.52
1936	944,941.24
1937	1,993,361.72
1938	1,535,431.52
1939	1,323,553.97
1940	1,679,254.72
1941	2,745,781.61
1942	2,490,824.75
1943	2,663,822.60
1944 (3 months)	815,028.64
Total	$16,212,733.29

Furthermore, as showing the importance thereof, is the re-enactment of this tax statute by the legislature of Wisconsin four times since the decision by the Supreme Court of Wisconsin in *State ex rel. Froedtert G. & M. Co. v. Tax Comm.*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, and twice subsequent to the decisions in 1940 by this Court in the prior cases. By these re-enactments the legislature used the language of the statute as meaning, saying and having the effect as set forth in said decisions. It is thus inescapable that the legislature so intended and that this statute thereafter could not and cannot be held to provide

otherwise than as interpreted and sustained in such decisions.

Of somewhat the same character is the way in which the briefs by both appellants make various references to the method of computation of the tax in such a manner as to infer that the surplus analysis method is the creature of and was promulgated by the Wisconsin Department of Taxation. The use of such surplus analysis method was specifically directed by the Supreme Court of Wisconsin in *J. C. Penney Co. v. Tax Comm.*, (1941) 238 Wis. 69, 298 N. W. 186 (upon remand) and, in the decision in the companion case, *International Harvester Co. v. Dept. of Taxation*, (1943) 243 Wis. 198, 210, 10 N. W. (2) 169, it said:

> "* * * The formula *prescribed by this court upon remand* in the Penney Case, supra, that is, that the Wisconsin earnings should constitute the numerator of the fraction of which the entire amount available for dividends is the denominator, is rational and workable and was applied in this case. * * *" (Emphasis supplied)

I. NO CONFLICT EXISTS BETWEEN THE DECISIONS OF THIS COURT AND THE SUPREME COURT OF WISCONSIN.

The Privilege Dividend Tax Law, as originally enacted by Section 3, Chapter 505, Laws of 1935, and amendments thereto, first came before the Supreme Court of Wisconsin in *State ex rel. Froedtert G. & M. Co. v. Tax Comm.*, (1936) 221 Wis. 225, 265 N. W. 672. In the opinion in that case the court held, and the mandate expressly provided, as follows:

> "It is declared and adjudged that sec. 3, ch. 505, Laws of 1935, as amended by ch. 552, Laws of 1935, does not violate the constitution of the state of Wis-

consin or the constitution of the United States, and is valid." (p. 240)

A motion for re-hearing was thereafter made and denied. In connection with this motion for re-hearing it was vigorously argued that the law was invalid as applied to foreign corporations, that it was not severable, and that consequently it was invalid as applied to domestic corporations. In the opinion denying the re-hearing, reported 221 Wis. 240, 267 N. W. 52, that court expressly passed upon the question and held the law valid as applied to foreign corporations.

Subsequent to this *Froedtert* case this Court rendered its decision in *Connecticut General Life Insurance Co. v. Johnson*, (1938) 303 U. S. 77, 58 S. Ct. 436, 82 L. ed. 457. The Supreme Court of Wisconsin interpreted the opinion in that case as expressing a position that made the Privilege Dividend Tax Law invalid as violative of the Fourteenth Amendment. Consequently it felt obliged to follow said decision and therefore, solely on that basis, overrule its former decision and hold the tax law violative of the provisions of the United States Constitution. *J. C. Penney Co. v. Tax Comm.*, (1940) 233 Wis. 286, 289 N. W. 677; *F. W. Woolworth Co. v. Tax Comm.*, (1940) 233 Wis. 305, 289 N. W. 685; *Minnesota Mining & Mfg. Co. v. Tax Comm.*, (1940) 233 Wis. 306, 289 N. W. 686.

Upon *certiorari* this Court clarified this and expressly held that its decision in the *Connecticut General Life Insurance Co.* case is not to be interpreted as making the Privilege Dividend Tax Law violative of the United States Constitution. *Wisconsin v. J. C. Penney Co.*, (1940) 311 U. S. 435, 61 S. Ct. 246, 85 L. ed. 267; *Wisconsin v. Minnesota Mining & Mfg. Co.*, (1940) 311 U. S. 452, 61 S. Ct. 253, 85 L. ed. 274; *Wisconsin v. F. W. Woolworth Co.*, (1940) 311 U. S. 622, 61 S. Ct. 395, 85 L. ed. 395.

This Court sustained the tax upon the same basis

that the *Froedtert* case was decided and approved the principles thereof. In *State ex rel. Froedtert G. & M. Co. v. Tax Comm.*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, the privilege dividend tax was sustained as a tax upon the transfer or devolution from a corporation to its stockholders of income earned out of corporate property located in Wisconsin and corporate business transacted in Wisconsin. The basis of the power of the state to tax such a transfer was rested by that court upon the circumstance that the earnings transferred were earned in the state and were taxable in the state. Thus, the court said that if the earnings were taxable in the state they could be subjected to a transfer tax. The following excerpts from the opinion in that case remove any question as to the basis of its decision:

> "* * * The basis of the instant tax is the fact that the dividends result from earnings from property situated or business transacted within this state. Such earnings are a proper subject of taxation, and therefore a proper basis for an excise tax on the transfer of the dividends resulting therefrom. * * *" (Pages 241-242)
>
> "* * * It is to be noted that the tax imposed on the salaries of nonresidents involved in the *Travis case, supra*, [*Travis v. Yale & Towne Mfg. Co.*, (1920) 252 U. S. 60, 64 L. ed. 460, 40 S. Ct. 228] was held not to impose a personal liability upon the nonresident employe. The tax, except as to a feature not involved herein, was upheld as a sequestration at their source of payment of earnings properly taxable which is precisely and only what the instant statute does." (Page 235)
>
> "* * * We perceive no more difficulty in taxing the transfer of dividends of foreign corporations attributable to business transacted or property situated within the state than in taxing such corporations on income so derived, and the validity of the latter form of taxation is established. The fact that the dividends involved are derived from earnings within the state gives them a constructive situs within the state. They

> are as readily collectible as is an income tax against a foreign corporation. Liability for payment of the tax is imposed upon the corporation. If such liability may be imposed there is no difficulty about collecting it, and there is no more difficulty about imposing the liability than existed in the *Travis Case, supra*, about imposing upon the employer liability for the income tax on salaries of nonresidents earned within the state." (Pages 245-246)

In its decisions in *J. C. Penney Co. v. Tax Comm.*, (1940) 233 Wis. 286, 289 N. W. 677; *F. W. Woolworth Co. v. Tax Comm.*, (1940) 233 Wis. 305, 289 N. W. 685; *Minnesota Mining & Mfg. Co. v. Tax Comm.*, (1940) 233 Wis. 306, 289 N. W. 686, the Supreme Court of Wisconsin adhered to its construction of the law as laid down in the *Froedtert* case. However, as stated in its opinion, it felt that the decision of this Court in *Connecticut Gen. L. Ins. Co. v. Johnson*, (1938) 303 U. S. 77, 58 S. Ct. 436, 82 L. ed. 673, necessitated the overruling of the view taken in the *Froedtert* case to the effect that the earning of income within the state furnished a basis for the imposition of the tax upon the transfer of that income from a corporation to a stockholder. Being of this view, the court felt that the tax could not be sustained under the Fourteenth Amendment and so held.

At the hearings upon *certiorari* before this Court we freely admitted that the state could not tax the privilege of transferring a dividend or the physical act of making the transfer if this privilege and this act were to be considered without relation to the earning of the income distributed and the benefit enjoyed of the protection of the law of Wisconsin in respect to the doing of business in Wisconsin. We claimed, however, that the decision of this Court in the *Froedtert* case was correct; that the derivation of earnings in this state by a corporation and the benefit enjoyed of the protection of the laws of Wisconsin entitled the state to tax the transfer of such earnings to

its stockholders *at the time of such transfer;* and that the *Connecticut General Life Ins. Co.* case should not be interpreted as holding to the contrary.

As we read the decision of this Court it bases the jurisdiction of the state to impose the privilege dividend tax upon precisely the same ground that the jurisdiction was rested in the *Froedtert* case, namely upon the jurisdiction to tax Wisconsin earnings and to measure a tax as payment for protection and enjoyment given by a state under its laws by the fruit thereof. This Court said in its opinion in the case, as the Supreme Court of Wisconsin said in the *Froedtert* case, that the State of Wisconsin possessed jurisdiction to tax the income or earnings of foreign corporations attributable to the transaction of business in the state. It said that if the present tax were to have been expressly denominated a tax on earnings, payable at the time of distributing such earnings, no court could have questioned the power of the state to levy such a tax.

From this premise it reasoned that the tax in practical operation subjected the transfer of Wisconsin earnings of foreign corporations to taxation and by reason of that fact was within the power of the state to impose the same.

The following passages from the court's opinion state the basis of its decision:

> "* * * The practical operation of this legislation is to impose an additional tax on corporate earnings within Wisconsin but to postpone the liability for this tax until such earnings are paid out in dividends. In a word, by its general income tax Wisconsin taxes corporate income that is taken in; by the Privilege Dividend Tax of 1935 Wisconsin superimposed upon this income a tax on corporate income that is paid out." (61 S. Ct. 248, 85 L. ed. 224.)

> "Had Wisconsin, as part of its price for the privileges it afforded foreign corporations within its borders, explicitly provided for a supplementary tax on the Wisconsin earnings of such corporations, but post-

poned liability for the tax until such earnings were to be paid out in dividends, the power of Wisconsin to do so would hardly be questioned. * * * Since the process for declaring dividends and the details attending their distribution among the stockholders transpired outside Wisconsin, although the exaction was apportioned to the earnings derived from Wisconsin, the state court concluded that the tax was an attempt by Wisconsin to levy an exaction on transactions beyond Wisconsin's borders.

"The case thus reduces itself to the inquiry whether Wisconsin has transgressed its taxing power because its supreme court has described the practical result of the exertion of that power by one legal formula rather than another—has labeled it a tax on the privilege of declaring dividends rather than a supplementary income tax." (61 S. Ct. 249, 85 L. ed. 225)

"* * * That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return. The substantial privilege of carrying on business in Wisconsin, which has here been given, clearly supports the tax, and the state has not given the less merely because it has conditioned the demand of the exaction upon happenings outside its own borders. The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction. * * *"

"* * * Here, on the contrary, the incidence of the tax as well as its measure is tied to the earnings which the State of Wisconsin has made possible, in so far as government is the prerequisite for the fruits of civilization for which, as Mr. Justice Holmes was fond of saying, we pay taxes. * * *" (61 S. Ct. 250, 85 L. ed. 226)

This language of this Court should be considered in relation to the statements of the Supreme Court of Wisconsin above set out to the effect that the privilege dividend tax in its practical operation is "a sequestration at

their source of payment of earnings properly taxable." We submit that the concept of jurisdiction to tax implied in the quoted statement in the *Froedtert* case cannot be fairly distinguished from the concept evidenced by the decision of this Court in *Wisconsin v. J. C. Penney Co.*, (1940) 311 U. S. 435, 61 S. Ct. 246, 85 L. ed. 267.

Moreover, aside from the language used in the *Froedtert* case, it must be evident that the basis of the jurisdiction to tax there asserted is the same as that which was found to exist by this Court. In the *Froedtert* case this Court held that the tax must be rested upon the jurisdiction of this state to tax the earnings transferred. In other words, it was the fact that the state had afforded protection in the acquisition, preservation and distribution of the income that permitted it to tax the distribution of that income. The earnings were regarded as having a situs in this state for purposes of taxation and the tax was regarded as falling upon said earnings at the time of distribution thereof.

It is thus seen that this Court did not hold the tax here in question to be an income tax, as that term is commonly understood. It only held, as the Supreme Court of Wisconsin had held before it in the *Froedtert* case, that for purposes of taxing jurisdiction under the Fourteenth Amendment the tax in its practical operation fell upon that which the state had jurisdiction to tax, namely, earnings derived from business transacted within its territorial jurisdiction. It will be noted that this Court used the words "income" and "earnings" interchangeably. If it had used the word "earnings" throughout its decision, it probably would not occur to anyone to say that the tax was held to be an income tax.

In *J. C. Penney Co. v. Tax Comm.*, (1941) 238 Wis. 69, 298 N. W. 186 (on remand) the Supreme Court of Wisconsin said at page 72:

"Inasmuch as the legislature expressly declared the tax to be for the "privilege of declaring and receiving dividends," we denominated it an excise or privilege tax. *State ex rel. Froedtert G. & M. Co. v. Tax Comm.* (1936) 221 Wis. 225, 233, 265 N. W. 672, 267, N. W. 52. We said:

"'However the legislature may have regarded the tax, we have no difficulty in construing the statute as imposing an excise or privilege tax upon the transaction involved of transferring the dividends from the corporation to its stockholders.'"

Further in said opinion it said at page 73:

"* * * we do not understand that the supreme court of the United States held the tax in question to be an income tax and sustained it as such. The supreme court of the United States said (p. 444):

"'These tags are not instruments of adjudication but statements of result in applying the sole constitutional test for a case like the present one. That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return. *The substantial privilege of carrying on business in Wisconsin, which has here been given, clearly supports the tax, and the state has not given the less merely because it has conditioned the demand of the exaction upon happenings outside its own borders.* The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction.'"

"We understand the court upon the whole case to hold that the state of Wisconsin has jurisdiction to levy the tax in question upon the 'privilege of declaring and receiving dividends' out of income earned within the state of Wisconsin even though the dividend is declared under the law of the state of Delaware or New York and the transaction of declaring the dividend took place within the state of New York where the disbursement was made.

> "The only question presented by the record on appeal to the supreme court of the United States was whether the state had jurisdiction to levy the tax. The supreme court of the United States was not asked to construe the statute. That is matter under the decisions of the supreme court of the United States which is clearly a function of this court, and we must assume that the supreme court of the United States made its decision in recognition of that fact. While we do not concur in the view of the supreme court of the United States as to jurisdiction, we are bound by its decision and yield to it upon the ground stated and upon no other."

To the extent there may be anything in the language used in the opinion in *J. C. Penney Co. v. Tax Comm.*, (1941) 238 Wis. 69, 298 N. W. 186, (upon remand) which appellants assert as supporting their thesis of conflict, it has been completely clarified and eliminated by the express language of the decision in *International Harvester Co. v. Dept. of Taxation*, (1943) 243 Wis. 198, 10 N. W. (2) 169. The very same arguments that are made here were made to the Supreme Court of Wisconsin upon the argument before it in the cases of *International Harvester Co. v. Dept. of Taxation*, (1943) 243 Wis. 198, 10 N. W. (2) 169; *Minnesota Mining & Mfg. Co. v. Dept. of Taxation*, (1943) 243 Wis. 211, 10 N. W. (2) 174 and also in the cases *Wisconsin Gas & Electric Co. v. Dept. of Taxation*, (1943) 243 Wis. 216, 10 N. W. (2) 140; *Blied v. Wisconsin Foundry & Machine Co.*, (1943) 243 Wis. 221, 10 N. W. (2) 142. That court specifically addressed itself to the proposition and in *International Harvester Co. v. Dept. of Taxation*, (1943) 243 Wis. 198, 10 N. W. (2) 174, said in the unequivocal language previously quoted at pages 17 and 18 of this brief, that its basis of holding this law valid is the same as that upon which this Court sustained it in the prior cases. It would seem that this should be conclusive.

Moreover, there are considerations which precluded and presently prevent this tax law from being construed as having any different effect or operation than that which it was held to have in the decisions of the Supreme Court of Wisconsin in *State ex rel. Froedtert G. & M. Co. v. Tax Comm.*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52 and of this Court in *Wisconsin v. J. C. Penney Co.*, (1940) 311 U. S. 435, 61 S. Ct. 246, 85 L. ed. 267; *Wisconsin v. Minnesota Mining & Mfg. Co.*, (1940) 311 U. S. 452, 61 S. Ct. 253, 85 L. ed. 274; *Wisconsin v. F. W. Woolworth Co.*, (1940) 311 U. S. 622, 61 S. Ct. 395, 85 L. ed. 395. As previously noted, under the heading "Statutes Involved," the Wisconsin Privilege Dividend Tax Law was enacted in 1935 and took effect upon its publication September 26, 1935. The decision of the Supreme Court of Wisconsin in the *Froedtert* case was on April 26, 1936. The decision of this Court in the *Penney* case was on December 16, 1940 and rehearing was denied January 13, 1941. The decision of the Supreme Court of Wisconsin in *J. C. Penney Co. v. Tax Comm.*, (1941) 238 Wis. 69, 298 N. W. 186 (upon remand) was on May 20, 1941.

The legislature of Wisconsin, because this tax law as originally enacted was effective only to July 1, 1937, in effect re-enacted it by Ch. 309 of the Laws of Wisconsin of 1937 (effective on its publication on June 30, 1937) extending its operation to July 1, 1939. It is irrefutable that in so doing the legislature of Wisconsin in re-enacting this statute intended to and did accept the interpretation and construction placed upon it by the Supreme Court of Wisconsin in the *Froedtert* case. In other words, the legislature had full cognizance and knowledge of the construction placed upon the law in the *Froedtert* case and yet re-enacted it, so far as here material, in the language of the original act. Such re-enactment in effect used said language as having the meaning, intent and effect which the court had given to it in the *Froedtert* case.

Under such circumstances such construction of the law is as much a part of it as if embodied therein in plain and unmistakable language. *Eau Claire National Bank v. Benson,* (1900) 106 Wis. 624, 627, 82 N. W. 604; *Milwaukee County v. City of Milwaukee,* (1933) 210 Wis. 336, 341, 246 N. W. 477. When a court has construed a statute that interpretation becomes as much a part of the statute as if written into it originally.

Once a statute has been construed by the court, the legislature by not amending it thereafter is deemed to have accepted the court's interpretation of the statute as a correct expression of the legislative intent.

Estate of Siljan, (1939) 233 Wis. 54, 59, 288 N. W. 775;

Evans v. Michelson, (1942) 241 Wis. 423, 426, 6 N. W. (2) 237.

The legislature of Wisconsin by Chapter 198 of the Laws of Wisconsin of 1939 (effective on its publication on June 30, 1939) again extended its operation to July 1, 1941 and thereby re-enacted this same statute, in so far as here material, the identical and original language of the law, and increased the rate from 2½% to 3%. It thus again in effect enacted a statute that can only have been intended to and did operate in precisely the way that the court in the *Froedtert* case had previously stated. Here again that language of the court in that decision became a part of this law just as much as though it had been written into the same. Accordingly, it is impossible to give any construction to that statute any different than that which was initially given to it by the Supreme Court of Wisconsin in *State ex rel. Froedtert G. & M. Co. v. Tax Comm.,* (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52.

But this is not all, the legislature of Wisconsin by Chapter 63 of the Laws of Wisconsin of 1941 (effective

on its publication April 30, 1941) again re-enacted this statute by extending its operation to July 1, 1943. This was subsequent to the decisions of the Supreme Court of Wisconsin in *J. C. Penney Co. v. Tax Comm.*, (1940) 233 Wis. 286, 289 N. W. 677; *F. W. Woolworth Co. v. Tax Comm.*, (1940) 233 Wis. 305, 289 N. W. 685; *Minnesota Mining & Mfg. Co. v. Tax Comm.*, (1940) 233 Wis. 306, 289 N. W. 686. By the same token, as so re-enacted such statute cannot be given any different interpretation than had prior thereto been given to it by the Supreme Court of Wisconsin in its prior decisions and by this Court in its decisions just mentioned.

Then finally, the legislature of Wisconsin by Chapter 365 of the Laws of Wisconsin of 1943 (effective on its publication June 30, 1943) again re-enacted this statute by extending its operation to July 1, 1945. This re-enactment was subsequent not only to the decisions of the Supreme Court of Wisconsin in the *Froedtert* and *Penney, et al.* cases and the decisions of this Court in the *Penney et al.* cases, but was also subsequent to the decision of the Supreme Court of Wisconsin in *J. C. Penney Co. v. Tax Comm.*, (1941) 238 Wis. 69, 298 N. W. 186 (upon remand. This re-enactment not only constitutes the adoption of this statute as intended to have the interpretation given to that language in the prior cases of the Supreme Court of Wisconsin and this Court prior to such re-enactment and incorporated it in the law just as effectively as if the language of the courts had been set forth therein, but also adoption of the construction given to it by the Supreme Court of Wisconsin in its opinion on remand specifying the surplus analysis method as the proper method to be used in computing the tax.

Due to the fact that some of the periods involved in the present appeal do not fall within all of the above extensions of this law by the legislature of Wisconsin it

is true that any extensions subsequent to such periods are not applicable. Nevertheless, this history of this tax law does show the legislative intent and demonstrates that had the legislature intended the statute to provide a tax different than as construed by the courts it obviously would have changed it to provide otherwise and as expressing what was its intention. As previously stated this tax law is a present operative part of the tax laws of the State of Wisconsin. The re-enactments thereof adopt the construction of the courts as an integral part of the statute the same as if written into it and it can only now be given that construction. It would indeed be most anomalous for the original taxing statute as enacted by Ch. 505, Laws of 1935 to be construed differently from the construction given to it by the Supreme Court of Wisconsin in the *Froedtert* case, and for the re-enactments of 1937, 1939 and 1941 should be given a different construction, or for there to be any variance in the construction of such re-enactments. Be that as it may, it is inescapable that the presently operative re-enactment of this statute was adopted with full cognizance of all the decisions of this Court and of the Supreme Court of Wisconsin in reference to this tax law, including the five cases decided by the Supreme Court of Wisconsin on June 16, 1943, of which the decision in the instant case was one, because Chapter 367 of the Laws of Wisconsin of 1943 was approved by the Governor of Wisconsin on June 29, 1943 and took effect upon its publication on June 30, 1943. Whatever may be said in reference to any of the other re-enactments it is submitted that it is inconceivable upon what basis it could be said that this present operative extension of this Wisconsin Tax Law does not incorporate in it as an integral part thereof, just as effectively as if written therein, the constructions and interpretations that have

been pronounced by this Court and the Supreme Court of Wisconsin.

As was said by the Supreme Court of Wisconsin in *Milwaukee County v. City of Milwaukee*, (1933) 210 Wis. 336, 342, 246 N. W. 447:

> "* * * Public officers had a right to rely upon the interpretation placed upon the statute by the court and acquiesced in by the legislature. *Assuming that the court has the power to reverse its former ruling*, it should not exercise it under the circumstances because it would unsettle governmental transactions now in process of being carried out entered upon in reliance upon it. * * *" (Emphasis supplied)

The obvious purpose of this tax law initially, and in all of its re-enactments, is to raise state revenue. In all of its re-enactments thereof the legislature relied upon the court decisions which were prior thereto and appraised its renewal thereof as a revenue producing measure in accordance with and in reliance upon those decisions. The legislature at those times was concerning itself with the fiscal affairs of the state and providing of such revenue measures as would produce the funds necessary to operate the state government. Even with the efficacy of the re-enactments of this tax law, appraised by the legislature in accordance with the interpretations placed upon it by the courts, it had to seek other and new fields of taxation and enacted various other new and additional tax measures in order to meet the state needs for revenue. It not only did, but certainly had a right to, rely upon this taxing measure as so construed and appraise it in the light thereof. Fiscal affairs of the state once settled under such circumstances must and should be maintained without danger of vacillation or uncertainty. The legislature in preparing the financial affairs of the state is entitled to accord finality to the decisions of the courts and to rely thereon in determining the future course of state affairs. This is the force of the

rule above stated that enactment or re-enactment of a statute under the above circumstances imports and incorporates into such taxing statute the interpretations placed thereon by the courts the same as if written therein in express language. Without this there cannot be any certainty to or continuity in the fiscal affairs of a state.

The concepts above set forth were somewhat recently expressed by this Court in *Newark Fire Ins. Co. v. State Board of Tax Appeals*, (1939) 307 U. S. 313, 323, 59 S. Ct. 918, 922, 83 L. ed. 1312, 1319, as follows:

> "Wise tax policy is one thing; constitutional prohibition quite another. The task of devising means for distributing the burdens of taxation equitably has always challenged the wisdom of the wisest financial statesmen. Never has this been more true than today when wealth has so largely become the capitalization of expectancies derived from a complicated network of human relations. The adjustment of such relationships, with due regard to the promotion of enterprise and to the fiscal needs of different governments with which these relations are entwined, is peculiarly a phase of empirical legislation. It belongs to that range of the experimental activities of government which should not be constrained by rigid and artificial legal concepts. Especially important is it to abstain from intervention within the autonomous area of the legislative taxing power where there is no claim of encroachment by the states upon powers granted to the national government. It is not for us to sit in judgment on attempts by the states to evolve fair tax policies. When a tax appropriately challenged before us is not found to be in plain violation of the Constitution our task is ended."

II. THIS COURT DID NOT HOLD THE TAX AN INCOME TAX AGAINST THE CORPORATION.

As previously stated in the preface ever since the decision of this Court in the prior cases, *Wisconsin v. J. C. Penney Co.*, (1940) 311 U. S. 435, 61 S. Ct. 246, 85 L. ed.

267; *Wisconsin v. Minnesota Mining & Mfg. Co.*, (1940) 311 U. S. 452, 61 S. Ct. 253, 85 L. ed. 274; *Wisconsin v. F. W. Woolworth Co.*, (1940) 311 U. S. 622, 61 S. Ct. 395, 85 L. ed. 395, the appellants have persisted in misconstruing what was said by this Court in such decision by contending that the tax in question was there held to be an additional income tax against the corporation and sustained it solely as such. This is an entirely erroneous interpretation of such decisions. What this Court there said was responsive to the arguments that were being made in those cases and when it used the words "supplementary income tax" it was not intended thereby to characterize the tax as an income tax. Rather, such language was used in discussing the jurisdiction to impose the tax and upon what considerations the same was founded. It said that the same principles which support an income tax are applicable to and support this tax, namely, that it is an exaction by the State of Wisconsin commensurate with and for privileges, benefits and protection rendered by the State of Wisconsin and levied at the time of realization of the benefits thereof. It was not meant that this tax is an income tax but that it is supplementary to the income tax and that the same fundamental principles are applicable to both.

The Court there said that if the State of Wisconsin had explicitly imposed an income tax, in addition to its regular income tax, on the earnings of corporations doing business in the state and derived from such business but postponed liability therefor until such earnings were paid out by way of dividends there could be no possibility of questioning jurisdiction to impose such a tax. It then said further that the fact that the State of Wisconsin has not couched the statute imposing this tax in language specifically exacting it as a price for the privilege of doing business in Wisconsin did not preclude this tax, whose operating incidents is to the same effect, from being a valid tax.

Such tax being imposed at the time of the distribution of the benefits realized from the doing of business in Wisconsin it was held that there is a fiscal relationship between the tax and the protection, opportunities and benefits given by the state in connection with enjoyment of the substantial privilege of carrying on business within its borders. Such protection exists not only in connection with the earning of the income in Wisconsin, distribution of which is the measure of the tax, but as well in the preservation of the property and business of the corporation in the state.

In other words, this Court did not say that this tax is an income tax but merely that jurisdiction to impose it is the same as that which is invoked in imposing an income tax and that merely because it is not labeled or imposed as an income tax does not destroy or deny the existence of basic jurisdiction to impose it which is rested upon benefits conferred, where the tax is measured by, geared to and imposed at the time of the realization of the fruits of such benefits and commensurate therewith.

The cases cited by this Court in its opinion adequately support this position set out therein.

III. THE SUPREME COURT OF WISCONSIN DID NOT HOLD THE TAX IS IMPOSED UPON THE STOCKHOLDER.

In support of their assertion that this tax has been "construed" by the Supreme Court of Wisconsin as a tax upon the stockholder, the appellants cite *Wisconsin Gas & Electric Co. v. Dept. of Taxation,* (1943) 243 Wis. 216, 10 N. W. (2) 104; *Blied v. Wisconsin Foundry & Machine Co.,* (1943) 243 Wis. 221, 10 N. W. (2) 142. Neither of these cases are to that effect.

In the first place the provisions of this tax law clearly provide that the corporation may deduct the tax from the

dividends paid to stockholders. The court thus did not and was not required to construe the statute, but merely gave effect to and applied the express provisions of it.

In the next place, all that the court decided in *Wisconsin Gas & Electric Co. v. Dept. of Taxation*, (1943) 243 Wis. 216, 10 N. W. (2) 140, was that because the Privilege Dividend Tax Law contained the provision it permitted the *burden* of the tax to fall *directly* on the stockholder and therefore the tax did not meet the qualifications specified in the provisions of sec. 71.03 (4) of the Wisconsin Income Tax statutes that in reporting its net income taxable in Wisconsin a corporation may deduct "taxes * * * paid during the year upon the property or business from which the income hereby taxed is derived * * *." What the court there held was that perforce of the deductibility provision of the Privilege Dividend Tax Law it was thereby shown that the privilege dividend tax was not imposed and did not fall as a burden on either the property of the corporation or the business activities of the corporation that produced the income taxed in that year—in other words, that the privilege dividend tax fell as a burden upon other than the corporation's income producing activities of that year.

The case of *Blied v. Wisconsin Foundry & Machine Co.*, (1943) 243 Wis. 221; 10 N. W. (2) 142 holds nothing more than that as applied to Wisconsin resident stockholders receiving dividends from Wisconsin corporations out of earnings in Wisconsin the deductibility provisions in the Privilege Dividend Tax Law are valid. Actually there is no basis for challenging the validity thereof and none was asserted in that case, excepting the claim that this Court had held the tax to be an income tax upon the corporation, and therefore it could not be deducted from the dividend remitted to the stockholder. All the court said in that case was that the Privilege Dividend Tax Law

expressly provides that the corporation could so deduct it and such provision is valid. If support be needed for this conclusion Section 1 of Article XI of the Wisconsin Constitution expressly provides:

> "SECTION 1. Corporations without banking powers or privileges may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. All general laws or special acts enacted under the provisions of this section may be altered or repealed by the legislature at any time after their passage."

and it has been held that rights of corporations and their stockholders are subject to the powers of the state to make changes in its laws as applied to them under this reserve power. *Johnson v. Bradley Knitting Co.*, (1938) 228 Wis. 566, 280 N. W. 688.

In this connection it is desired to note that the Brief for the United States in case No. 565, October Term, 1943, entitled *Wisconsin Gas & Electric Company v. United States of America*, at the top of page 20, erroneously sets out that the Supreme Court of Wisconsin at page 219 of its decision in *Wisconsin Gas & Electric Co. v. Dept. of Taxation*, (1943) 243 Wis. 216, 10 N. W. (2) 140, said that the controlling question in that case was:

> "Whether this is a tax upon the corporation, in which case it is assumed that it must be regarded as an expense of doing business deductible from gross income, or whether it is a tax upon the stockholders."

This makes it appear that the Supreme Court of Wisconsin said that if the tax were to be held by it to be a tax on the corporation then it would have to be regarded as a deductible expense, from which it is inferred that if it had held the tax to be upon the stockholder its decision necessarily would have been directly contrary to the one which it reached. Actually the Supreme Court of Wisconsin did

not say that such was the question nor did it make such inference. The above is not a quotation of the complete language of the court at that point in its opinion. In using the language that is quoted the Supreme Court of Wisconsin was merely saying that such was the contention of the appellant Wisconsin Gas & Electric Co. in that case and that in making such contention the appellant made the stated assumption. The full quotation is as follows:

> "We are favored with able briefs addressed to the question whether this is a tax upon the corporation, in which case it is assumed that it must be regarded as an expense of doing business deductible from gross income, or whether it is a tax upon the stockholder. We are not at all sure that all of this argument does not (to paraphrase the opinion of the United States supreme court in the *Penney Case, supra*) amount to glossing over the provisions of the statute with commentary and then construing the commentary rather than the text. The real question in this case is: On whom is the actual burden of this tax laid? This question can have but one answer. The statute specifically puts it upon the stockholder. The corporation is directed to deduct the tax from the dividends, and if it does as it is required to do, it sustains no expense and consequently may not, in any event, deduct the tax from its gross income. It is contended that the foreign stockholder of a foreign corporation has done no business in Wisconsin for which the tax may validly be levied. This contention was foreclosed when the supreme court of the United States sustained the power of Wisconsin to levy this tax. It made its determination with the statute before it—a statute that plainly puts the burden of this tax upon the stockholder and not upon the corporation. So far as Wisconsin's power to reach beyond its borders and to levy the tax is concerned, the United States supreme court has declared that Wisconsin has the right to exact the tax because of protection given to corporate activities in this state resulting in earnings traceable to the dividends declared and benefits to the stockholder who has received a dividend. At this stage of the litigation we are not concerned with the question of the power

to tax and we must assume that the power vindicated is the power to levy the very tax that was before the United States supreme court for consideration. That power having been sustained, regardless of what the tax be called or where its burdens may be considered to fall, it is immaterial that the United States supreme court has not merely regarded the privilege features of the tax as unimportant but has to some extent disregarded the corporate entity in view of the real benefits conferred by the state upon the stockholder. * * *"

Finally, the provisions of this law impose the tax upon the corporation. Liability for payment of the tax is placed squarely and solely upon the corporation. There is nothing in the Privilege Dividend Tax Law which compels the corporation to deduct the tax or imposing any penalty if it does not do so, and consistent administration of this law is and has been to that effect. The liability to the state for the tax is imposed upon the corporation. Whether it deducts the tax or not makes no difference as to its liability. It is the same in either case. If it deducts the tax and does not pay it over to the state the penalties for not doing so are the same as where it does not deduct the tax but absorbs it and does not pay it. There is no personal liability on the stockholder. If after deducting the tax and before the state asserts the tax the corporation's assets should be so dissipated or lost so the state could not collect the tax there can be no recourse against the stockholders for the tax. The same is true if the corporation had not deducted the tax at all from the dividends.

Whether the tax is deducted from the dividend paid by the corporation or not deducted therefrom, the burden of the tax falls on the stockholder. Not being a deductible expense of the corporation it is necessarily chargeable to and operates to reduce the surplus. By deduction from the dividend the burden falls *directly* on the stockholder, whereas in the other instance it falls indirectly on him by reducing the surplus or what would be the surplus avail

able for future dividends. In one instance the dividend is smaller and in the other the fund for potential dividends is reduced by the same amount. The net effect is the same.

In this connection it is to be noted that the tax is imposed at the time the dividend is declared and paid. It is conceded that if the corporation is not doing business at that time in the state then no tax is imposed and the consistent administration of the law has been to that effect. This shows that the imposition of the tax is geared to the doing of business in the state at the time the dividend is declared and paid and that it is directly related to the utilization of the fruits derived from doing business in the state and the receipt thereof by those beneficially exercising the same.

It is pointed out by the Supreme Court of Wisconsin in its decision in the instant cases that this deductibility feature of this tax law was in it and a part of it at the time when this Court considered and declared it valid in prior cases. In fact such provision was expressly called to the court's attention and made the basis of an argument at page 14 of the brief of the Respondent J. C. Penney Company in support of its Petition for Rehearing which was denied by this Court January 13, 1941 in *Wisconsin v. J. C. Penney Co.*, (1940) 311 U. S. 435, 61 S. Ct. 246, 85 L. ed. 267.

However, in any event, the validity or invalidity of the provision for deduction by the corporation from the dividend payments to stockholders in no way affects the liability of the corporation for the tax which is imposed. The express provisions of the Privilege Dividend Tax Law very clearly make the corporation liable for the tax. Whether or not it may in turn pass that liability on to the stockholders is purely a matter between them. In the *Froedtert* case the Supreme Court of Wisconsin held that this provision was valid. But, even if it were invalid the separa-

bility provision of Section 4 of the original enactment, Chapter 505 of the Laws of Wisconsin of 1935, would be operative and these provisions for deduction of the tax could be eliminated without in any way offending or affecting the validity of the remainder of the tax law.

IV. THE TAX IS CLEARLY WITHIN THE TAXING JURISDICTION OF THE STATE OF WISCONSIN.

The basic and fundamental considerations by which a tax is tested as to whether it is within the taxing jurisdiction of a state are well settled. The court is not concerned with the labels or nomenclature used or applied to the tax, but only with the practical operation of the tax. If the practical operation of the tax is that the state has thereby imposed an exaction in relation to opportunities which it has given, to protection which it has afforded, or benefits which it has conferred, and commensurate therewith, then the tax is within its taxing jurisdiction and therefore is not violative of the due process provisions of the Fourteenth Amendment. *Lawrence v. State Tax Comm.*, (1932) 286 U. S. 276, 280, 52 S. Ct. 556, 76 L. ed. 1102; *Senior v. Braden*, (1935) 295 U. S. 422, 55 S. Ct. 800, 79 L. ed. 1520.

Upon these principles, as an original proposition, the decision in *State ex rel. Froedtert G. & M. Co. vs Tax Comm.*; (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52 is sound. The tax is clearly within the taxing jurisdiction of Wisconsin and therefore there can be no denial of due process. A license tax imposed upon a corporation and measured by its earnings would certainly be within the taxing jurisdiction of the state if the state had jurisdiction to tax the corporate earnings. So far as taxing jurisdiction is concerned, however, unless the state had jurisdiction to tax the earnings, it could not impose a license tax

measured by the earnings. The practical operation and effect of the tax would result in a tax measured by corporate earnings and the power to impose such a tax would be based upon the power to tax the corporate earnings.

And so in the case of a transfer tax upon property. A state possessing the power to impose a tax upon property can impose a tax upon the transfer of that property resulting from the death of the owner.

Rhode Island Hospital Trust Co. v. Doughton. (1926) 270 U. S. 69, 46 S. Ct. 256, 70 L. ed. 475.

The jurisdiction to impose a transfer tax in such a case arises out of the fact that the state has jurisdiction to tax the property. The state, in protecting the acquisition, preservation and enjoyment of property, acquires the right to tax such property. For the same reason it may tax its transfer.

To sum up, it may be said that the privilege dividend tax is based upon precisely the same jurisdiction as is an income tax, namely, the right to tax corporate earnings which are earned under the protection of the State of Wisconsin. Unlike the ordinary income tax, however, it is not imposed upon the privilege of receiving the income, but rather it is imposed upon the transfer of the income from the corporation to its stockholders. The substance of the decision in the *Froedtert* case and of this Court is that if the state can tax the earnings of a corporation it makes no difference, for purposes of due process, whether the earnings are taxed upon the basis of their acquisition or upon the basis of their distribution by a corporation to its stockholders.

The appellants, notwithstanding the decisions of this Court and the Supreme Court of Wisconsin, continue to assert that there is no reasonable relation between protection afforded in the acquisition of corporate earnings and the preservation thereof, and a tax imposed upon the dis-

tribution of such earnings. This contention is palpably unsound, and the court could hardly find otherwise.

The payment of a dividend by a corporation is the culmination of a series of events, namely, (1) conduct of business resulting in earnings, (2) keeping and conserving the property of the corporation, which includes its surplus made up of earnings until used to pay the dividend, (3) formal act of declaration, (4) physical act of payment by the corporation, and (5) physical act of receipt by the stockholders. The first two are the foundation for the others and without which they could not take place. The fact that the last three may have taken place outside of the state does not destroy the fact that the various steps in the series must be considered as constituting one integrated and indivisible transaction—a transfer of the benefits resulting from the doing of business in the state. *Van Dyke v. Tax Comm.*, (1940) 235 Wis. 128, 135, 292 N. W. 313; *Ford Motor Co. v. Beuchamp*, (1940) 308 U. S. 331, 60 S. Ct. 273, 83 L. ed. 1031. It is by reason of having given benefits in respect to the earning of the income and the preservation thereof (indispensable elements in the series) that the State of Wisconsin has impregnable jurisdiction. The tax here involved is measured only by so much of the dividends declared as have been the result of the benefits conferred by the State of Wisconsin and its laws in connection with the two first elements. The taxable event is the composite of the last three elements, but it is not these events nor the doing thereof that are taxed, but it is the transfer that is completed by them. The jurisdiction of a state is as broad as the protection afforded and conferred by the state.

The object of the corporate form of enterprise is to do business in a form thought to be suited to the profitable transaction of business—to acquire earnings—to preserve the same—and to distribute such earnings among the mem-

bers of the corporation. The corporation itself is an artificial entity distinct from its members and exists for the purpose of transacting business and acquiring earnings but it is in the very nature of things incapable of enjoying its earnings. It is of the very essence of a corporate business enterprise that its earnings shall inure to the benefit of its members and that only its members shall enjoy its earnings.

Thus, protection of the law of a state in which a corporation does business is invoked and given for the purpose of making it possible to earn income for distribution to the members of the corporation and in preserving and protecting the same until so distributed. The protection so invoked and given cannot, therefore, be dissociated from the distribution of corporate earnings. Corporate income is earned for the purpose of distribution to the corporate members and the state protects the acquisition of corporate income and the preservation of the corporation's property and business in order that there may be earnings to distribute to the members.

There can be no doubt that the ultimate distribution of the fruits or profits from corporate business to its stockholders is the prime, if not the sole, objective of corporate enterprise. Thus, a tax upon the transfer of corporate earnings derived from business transacted in the taxing state, is laid upon the benefits arising out of the exercise of rights under and protected by the laws of the taxing state. It taxes such benefits at the time they are realized by the very persons for whom they were earned and by whom, at the time of earning, it was intended they would be realized.

The appellants have claimed that the tax is a tax upon the privilege of transferring dividends—that the state does not grant this privilege in the case of foreign corporations, and that, consequently, the state cannot exercise the priv-

ilege. This argument overlooks the real basis of Courts' position. In the *Froedtert* case the court specifically held that the word "privilege," as used in relation to the transfer here involved, was to be understood as equivalent to the word "right." Many taxes were referred to as being classified under the name of privilege taxes and which in fact involve a tax upon the exercise of rights.

An inheritance tax or death duty is commonly referred to as a tax upon the privilege of transferring property to the living from the dead. On the other hand a state may tax such a transfer notwithstanding the fact that it does not grant the privilege and may not regulate the privilege. This must necessarily be so, since if it were otherwise the federal government could not impose a transfer tax.

Snyder v. Bettman, (1903) 190 U. S. 249, 23 S. Ct. 803, 47 L. ed. 1035;

Knowlton v. Moore, (1900) 178 U. S. 41, 20 S. Ct. 747, 44 L. ed. 969.

Jurisdiction to tax the subject matter of a transfer is held to result in jurisdiction to tax the transfer.

Graves v. Elliott, (1939) 307 U. S. 383, 59 S. Ct. 913, 83 L. ed. 1356;

Curry v. McCanless, (1939) 307 U. S. 357, 59 S. Ct. 900, 83 L. ed. 1339;

Rhode Island Hospital Trust Co. v. Doughton, (1926) 270 U. S. 69, 46 S. Ct. 256, 70 L. ed. 475;

Snyder v. Bettman, (1903) 190 U. S. 249, 23 S. Ct. 803, 47 L. ed. 1035.

This is precisely the basis of the tax here involved as we have already indicated.

The appellants have also contended that the transfer is effectuated by acts without the state and consequently it is beyond the taxing jurisdiction of the state. This Court in the prior case denied the soundness of such a

contention. Its soundness has been denied likewise by other decisions of this Court. Cases dealing with inheritance taxes have sustained the power of a state to impose a transfer tax in cases where no physical act effectuating the transfer took place within the territorial jurisdiction of the state.

Graves v. Elliott, (1939) 307 U. S. 383, 59 S. Ct. 913, 83 L. ed. 1356;

Bullen v. Wisconsin, (1916) 240 U. S. 625, 36 S. Ct. 473, 60 L. ed. 830;

Van Dyke v. Tax Comm., (1940) 235 Wis. 128, 135, 292 N. W. 313;

Estate of Bullen, (1910) 143 Wis. 512, 128 N. W. 109.

The distribution or transfer that gives rise to the tax is a distribution of *accumulated* corporate earnings. There can be no doubt but that corporations acquire earnings or profits. The ordinary dividend declared by a corporation, so far as an income tax upon the stockholders receiving the dividend is concerned, is regarded as having been declared *out of earnings or profits*. Such a dividend is a distribution of corporate earnings.

Van Dyke v. Milwaukee, (1915) 159 Wis. 460, 146 N. W. 812, 150 N. W. 509.

A liquidating dividend, so far as the stockholder is concerned, of course, would be in an entirely different category to the extent that it represented a distribution of paid-in capital.

A corporation or an individual earning income may use the fruits of earnings for many purposes. The entire fruits of its earnings for a particular year may be paid out for operating expense. It has, nevertheless, derived earnings. Corporate earnings may be used during the year for the purchase of capital goods. They may be used for the pur-

chase of government bonds or they may be placed in a bank. For purposes of income taxation as against a corporation a tax is customarily imposed at the end of a calendar or fiscal year, as the case may be, upon its earnings during such preceding calendar or fiscal year. At the time that the tax is payable the earnings may have become a part of the corporate surplus, but the fact remains that the corporation has acquired earnings and may be taxed upon the basis of having acquired earnings.

So in the case of the privilege dividend tax. If the tax were expressly denominated as a kind of income tax directed against such part of a corporation's earnings as are paid out in dividends, being necessarily those earnings which have been accumulated, and payable at the time of such distribution, there could be no constitutional objection to the tax from the standpoint of jurisdiction.

The jurisdiction to impose the tax upon foreign corporations is derived from the power to extract from corporate enterprises an exaction measured by Wisconsin earnings distributed to stockholders in the form of dividends. The power to impose this exaction arises by reason of the protection that the state affords in the acquisition of earnings that are distributed and the protection thereof until so distributed. A tax law which imposes a tax upon the distribution of accumulated earnings in return for the protection given by the state in the process of acquiring and accumulating such earnings and in rendering protection in the preservation thereof and the property represented thereby, is a reasonable form of taxation and is nonetheless within the power of the state because one may choose to term accumulated earnings as capital. Appellants presuppose that there may be no tax upon the distribution of capital,—which is not a justifiable assumption. The instances in which excise taxes are imposed upon transfers of capital, such as inheritance and gift taxes,

are numerous and their validity is well recognized and beyond question.

In connection with any contention that the subject which is taxed is not an activity that has a real and substantial relationship to business transacted in Wisconsin or that the state has granted the benefit only in the years in which the accumulated income that has gone into surplus was earned, it is to be noted that protection and benefit of the laws of the State of Wisconsin has not only been afforded to the corporation in the years of earning of that income but just as effectively in the years of declaration and payment of the dividends therefrom. In the dissenting opinion of Justice Roberts it is acknowledged that income earned in Wisconsin and accumulated may be employed in subsequent years in the extension of the company's business or may be held as assurance against future business loss.

The surplus which is made up of such accumulated funds is not represented by any particular property. Surplus is a mere bookkeeping concept. It is the excess of property (assets) generally over the obligations and capital of the company. To the extent that the corporation does business while it has such surplus, any state in which it does business confers, during that particular year, the benefits of its government and the protection of its laws in the use of such funds in the extension of its business, and in the preservation and the protection of its then present business and properties. Such business and properties so conducted in the state utilize and encompass a proportionate share of the surplus and have a direct bearing thereon. If the business activities and the properties of the corporation in the state were not protected and given the benefit of the laws of the state during the year in which the dividend is declared and paid, such proportionate share of the surplus, or even the whole surplus of the

company might be entirely dissipated. Conditions might even be so adverse as to cut into capital.

Any idea that a state rendering benefits to a foreign corporation in doing business in such state under the protection and benefits of its laws is limited by some concept of *quid pro quo* of license fees or taxes, imposed during the time when business was successful in the state and earnings were acquired and accumulated, is most unrealistic. A corporation might do business in a state for a number of years successfully and pay out none of its net income from activities in the state, but accumulate them and hold them in surplus. That the state, instead of increasing the income taxes imposed by it on such net income during the years in which it was earned, deems it more fair to wait until the fruits of doing business are no longer deemed necessary for expansion or as a financial cushion of the corporation and are paid out to the ultimate beneficiary, does not mean that in the subsequent years during which the corporation may have continued to do business in the state, it has not rendered protection and benefit to the corporation in the preservation and protection of its properties during the continuation of doing business in the state.

The benefits which flow from a state government and are enjoyed by those who operate under its protection at any particular time, or during any particular period of time, are not the result solely of expenditures by the state at such time or during such period. Such government, both physically and as an organization, has been built up through expenditures and efforts of the state over a long period of time. The enjoyment of the benefits of state government cannot be measured on a *quid pro quo* basis of expenditures or cost during that particular period. To do so would require a system of cost accounting which is not applicable to government.

Fiscal affairs of a state are solely upon an operating expenditure basis. Development of the governmental system generally is financed by expenditure over the years. Likewise things that are now done, which may call for large present expenditures, may, within our concept of government, be spread into the future and be borne by those who at that time will also partake of the benefits in the future of what may be done now.

Even if this were a tax on the stockholders there is nothing in the Constitution which precludes a state legislature, that permits corporations foreign and domestic to do business within the state, in the imposing of taxes on fruits thereof from looking through the corporate entity and imposing the tax upon the real beneficiaries when and as they realize such fruits and who enjoy such benefits in the precise amount by which the tax is measured.

If a state cannot impose an income tax on nonresident stockholders for dividends paid by corporations doing business in that state out of earnings derived therefrom the sole reason it cannot is because an income tax is imposed only upon the *receipt* of income. Here the tax is on the transfer and is placed on the corporation which is the only one made liable for the tax.

The foregoing propositions support this whether it be viewed as a tax upon the corporation or as a tax upon the stockholders. For present purposes it makes no difference upon whom the tax is imposed for the burden falls, directly or indirectly, upon him who has enjoyed the benefits conferred by the state and at the time of his realization of the fruits thereof. Giving effect to substance and disregarding form, the practical operation of the tax, regardless of its label or name, upon whom it is directly laid, or where the burden of it falls, is the imposition by the state of a compensatory tax. *Biddle v. Commr.*, (1938) 302 U. S. 573, 58 S. Ct. 379, 82 L. ed. 431; *Barnes v. Railroad*,

(1873) 17 Wall. (84 U. S.) 294, 21 L. ed. 544; *Bailey v. N. Y. C. & H. R. R. Co.*, (1875) 22 Wall. (89 U. S.) 604, 22 L. ed. 840; *Railroad Co. v. Collector*, (1879) X Otto (100 U. S.) 595, 25 L. ed. 647.

V. THE PRIVILEGE DIVIDEND TAX IS NOT A RETROACTIVE TAX.

Appellants urge that because the surplus is made up of accumulated income of past years the tax cannot be measured by any portion of a dividend that represents a distribution of earnings accumulated prior to the enactment of this tax law, because to do so would be invalid for retroactivity. This completely overlooks the fact that the tax is imposed at the time the transfer takes place and does not operate retroactively to tax anything that has gone on or taken place prior thereto.

This tax is not a retroactive tax. It does not impose an income tax on the receipt of income in the past. It imposes the tax in the year in which the dividend is declared and paid—a present occurring transaction. The fact that if a corporation is not doing business in the state when a dividend is declared and paid, no tax is imposed in that case, shows this very clearly.

Even if it were subject to the same considerations as an income tax in this regard, it is no more retroactive in its operation and effect than the taxation of a capital gain in the year of sale, when a profit or gain results from an increment over the years since its purchase in a past year. The tax is merely measured by the accumulated income that is used to pay the dividend and which as between the parties to the transfer is still income and used as such. The tax attaches upon the distribution and is measured by it. It measures the benefit received by the amount of realization from it and is fair as the monetary equivalent thereof.

If a state can tax the capital used in doing business within its borders notwithstanding it may have been accumulated in years prior to the tax, it certainly levies the tax for the utilization thereof in such years. Then, it would seem clear that it may measure that utilization by the amount realized therefrom and impose a tax using such measure. That is the precise situation here and there can be no suggestion that this is retroactive taxation.

Here under *Welch v. Henry*, (1937) 223 Wis. 319, 271 N. W. 68, 226 Wis. 595, 277 N. W. 183, affirmed 305 U. S. 134, 59 S. Ct. 121, 83 L. ed. 87, the legislature could have made this tax law impose the tax on all dividends declared paid during the prior year 1934, in which event then the tax would have been truly a retroactive tax. It would then have imposed a tax back upon something which took place prior to its enactment. But, under that case it would have clearly been valid. Such mechanics of the tax are entirely different from those of the instant tax. Here the tax is imposed upon the occurrence of a presently occurring event.

The tax is no more retroactive than the Federal tax on undistributed profits or in fact than any transfer tax. The instant tax is wholly unlike the tax in *Welch v. Henry, supra*. There the legislature admittedly, *in a year* subsequent to the year in which income was realized and received, imposed a retroactive tax thereon as *income*. It imposed a tax *in a year subsequent* to the year in which income was received, upon *income* received in a prior year, which at the time of its receipt was specifically exempted from being taxed as income. Here, however, the tax is imposed upon a present act or occurrence which takes place during the tax year. The distinction seems well illustrated by the following quotations from the dissenting opinion of Justice Fairchild in *Welch v. Henry, supra*, where he said:

"* * * It seems to me that the limits of the powers conferred upon the legislature by the people have been exceeded in this particular. It has never been considered fair play to impose burdens or penalties by *later legislation* upon a fellow citizen for *an act or transaction* which was lawful at the time of its occurrence, and the power to do that was withheld from governmental agencies by the people. * * *" (Page 336) (Emphasis ours)

"Apart from the quoted remark in the *Stockdale Case*, there is no authority for holding that after *an income tax on income received during a given year* has been assessed and collected, the legislature may constitutionally tax the income received that year to a further extent. Fairness suggests that when a taxpayer's tax on one year's income has been assessed and paid according to the law then in force, the taxpayer is justified in concluding that the matter is closed except for fraud or erroneous assessment. * * *" (Page 339) (Emphasis ours)

"* * * Laws relating *to acts and events to occur in the future are acceptable* and may be justified in taxation under the fundamental policy of protecting the rights of all and preserving the integrity of the government, but impositions on closed transactions cannot long be tolerated in a free government. Mr. Justice STORY in the case of *Society for the Propagation of the Gospel v. Wheeler*, Fed. Cas. No. 13,156, 2 Gall. *105, 139, defined a retroactive or, as he called it, a retrospective law:

"'Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, *in respect to transactions or considerations already passed*, must be deemed retrospective.'" (Page 340) (Emphasis ours)

Thus, viewed as a tax on the corporation it is not retroactive. On the other hand even if it were a tax upon the stockholder, then clearly it is not retroactive.

In *Van Dyke v. Milwaukee*, (1916) 159 Wis. 460, 146 N. W. 812, the Supreme Court of Wisconsin answered the question as to whether dividends declared and distributed

during 1911 by a going corporation out of surplus on hand prior to January 1, 1911, when the income tax law went into effect, were taxable as income for 1911? It held that an affirmative answer must be given to this question because the plaintiff, a stockholder in the corporation, received income during 1911 and said at page 465:

> "*It was immaterial when it was earned by the corporation.* As a stockholder he [taxpayer] acquired no right to it until it was distributed in the form of a dividend. The profits of a corporation become income to stockholders when distributed as dividends but not before." (Five cases cited.)

To paraphrase the holding of the court in the *Van Dyke* case, the dividends there taxed were received by the stockholder in the year in which the assessment was made and so far as he is concerned he received no income until distribution was made as a dividend. The dividend was *to him* income of the year he received the dividend, which is the same year the tax is assessed. Hence, no Wisconsin earnings can be said to be taxed in any sense of the word, but a dividend is being taxed in the year of its distribution. —clearly not retroactive taxation. The *Van Dyke* case was followed in *State ex rel. Sallie F. Moon v. Tax Commission,* (1917) 166 Wis. 287, 163 N. W. 639, where the court said on page 289:

> "The fact that it [a dividend] was received during 1911 makes it taxable irrespective of when it arose or accrued. That such provisions of the law do not render it void was held in the income tax cases. . . . This surplus was not income to the . . . company but it was to its stockholders when distributed."

The dividends paid to a stockholder even though out of surplus accumulated prior to the enactment of the law was not the taxation of earnings to the corporation but the taxation of a dividend received in the assessing year by the stockholder and the corporation was simply made liable

for its collections. Mr. Chief Justice Winslow, in this *Sallie F. Moon* case, expressed the proposition in a very simple and direct manner in the following language at page 293:

> "Suppose A. had property worth $10,000 in hand at the time the Income Tax Law went into effect and disposed of it a year later for exactly $10,000, he has received no income, but if he conveys it to B. as compensation for services, B. has clearly received an income and is subject to an income tax.
>
> "A corporation is one person, a stockholder in the corporation is a different person. Undivided profits in the treasury of the corporation belong to the corporation, not to the stockholder. They may be lost or squandered or put into improvements of the corporation property and never come to the hands of the stockholders. Such profits which were in existence at the time the Income Tax Law went into effect remain property so far as the corporation is concerned and in no sense income received by the corporation; but when dividends are declared out of them, such dividends become in every proper sense income in the hands of the stockholders.
>
> "For these reasons we perceive no conflict between the two decisions."

The three members of the Supreme Court of Wisconsin taking the view that the tax is retroactive said the case should be decided on the analogy to the income tax cases. Hence, even based upon their own theory, there is no retroactivity since none of the dividends are income to the individual stockholder until declared and paid to him, which admittedly takes place in the year in which the privilege dividend tax is imposed.

In *Morgan v. Tax Comm.*, (1928) 195 Wis. 405, 217 N. W. 407, 218 N. W. 810, a distribution to stockholders of profits in part earned prior to the effective date of the income tax law was again held taxable as income when distributed and not bad for retroactivity. See especially the opinion on rehearing at page 409.

In *Falk v. Tax Comm.*, (1935) 218 Wis. 130, 134, 259 N. W. 624, the court makes very clear its adherence to the *Van Dyke* case by pointing out that it took a change in the income tax law through Chapter 247 of the Laws of 1917 to prevent the taxation of dividends, distributions by a corporation out of earnings or profits accrued prior to the effective date of the law.

The dividend tax situation is much stronger than any of the income tax cases cited because the dividend tax has been held to be a privilege or excise tax on a transaction, which transaction admittedly takes place in the assessing year, whereas in the cases cited the tax was on income admittedly earned prior to the effective date of the income tax law. How then, in the face of these decisions can the viw of retroactivity be sustained?

In the *Income Tax Cases*, (1912) 148 Wis. 456, 514, 134 N. W. 673, the court saw no problem and said briefly:

> "One further objection we overrule here without comment, for the reason that it seems very unsubstantial, namely, the objection that the law is retroactive and void, because assessed on incomes received during the entire year 1911, while it did not go into effect until July 15th of that year, and also because it includes profits derived from the sale of property purchased at any time within three years previously."

The privilege dividend tax is not a tax on corporate earnings but on the privilege of, *first*, the *declaration* of a dividend out of earnings, which exercise of privilege takes place in the year in which the tax is assessed and hence is never retroactive, and *secondly*, upon the privilege of *receiving dividends* by stockholders out of corporate earnings having their roots in Wisconsin business or property the receipt of which likewise takes place in the year which is always the year in which the tax is assessed, and hence not retroactive. It is because of the above and because the court holds the tax to be a privilege tax (not an income

tax), the burden of which is borne by the stockholder, that *Van Dyke v. Milwaukee*, (1916) 159 Wis. 460, 146 N. W. 812, is here controlling, rather than such cases as *Welch v. Henry*, (1937) 223 Wis. 319, 271 N. W. 68, 226 Wis. 595, 277 N. W. 183, affirmed 305 U. S. 134, 59 S. Ct. 121, 83 L. ed. 87, which limit the extent to which *"earnings"* of an *individual* may be taxed.

In *Welch v. Henry, supra*, in an opinion written by the learned justice who wrote the opinion in *International Harvester Co. v. Wisconsin Dept. of Taxation*, on the instant cases, the court was undoubtedly greatly influenced by factors not present in this case. There the dividend income sought to be taxed was once *expressly* exempt from taxation and that type of retroactive taxation which reaches back beyond a maximum of two years is indeed distasteful and unfair, but here no such considerations are present. Here the tax is laid upon a transaction within thirty days after the act giving rise to the right to tax takes place. The taxpayer is not taxed on *income* received two years prior to the assessment as was in *Welch v. Henry, supra*, but is taxed the instant the corporate earnings are distributed. From the standpoint of the burden of the tax falling on the stockholder nothing need by done by him—his corporation withholds and pays the tax. He had no right to the surplus until his corporation made the surplus available to him in the form of dividends.

Arguments founded upon asserted unfairness of this tax because the corporation had no opportunity to avoid it because not anticipated are without merit. It could have declared and paid dividends to the full extent of its surplus had it desired to do so during the time this tax law was pending in the legislature. Furthermore, it does not have to continue to do business in the state and is free to withdraw therefrom. As previously pointed out should

it do so then it would not be subject to this tax when and if it pays dividends.

Scattered through the Brief of Appellant in Case No. 620, in which the International Harvester Company is appellant, there are references to details in the computation of the taxes here involved and, if not actually then inferentially, complaining in respect thereto. To the extent any such arguments relate to the details of computation they are foreclosed by and contrary to the stipulation entered by counsel for appellant (Case No. 620, R. 30-31) and should be disregarded.

CONCLUSION

It is respectfully submitted that the tax law in question has not been shown to be and is not violative of the Fourteenth Amendment to the Constitution of the United States, and that the decisions of the Supreme Court of Wisconsin affirming the tax here involved should be affirmed.

Respectfully submitted,

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APPENDIX

The Wisconsin statutory tax law here involved, enacted by Chapter 505, Laws of Wisconsin of 1935, effective on its publication on September 26, 1935, and as amended by Chapter 552, Laws of Wisconsin of 1935, effective on its passage and publication on October 8, 1935, and by Chapter 233, Laws of Wisconsin of 1937, effective June 14, 1937, is as follows:

"Section 3. Privilege Dividend Tax. (1) For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state, there is hereby imposed a tax equal to two and one-half per centum of the amount of such dividends declared and paid by all corporations (foreign and local), except those specified in paragraphs (d) and (g) of subsection (1) of section 71.05 of the statutes, after the passage and publication of this act and prior to July 1, 1937. Such tax shall be deducted and withheld from such dividends payable to residents and nonresidents by the payor corporation.

"(2) Every corporation required to deduct and withhold any tax under this section shall, on or before the last day of the month following the payment of the dividend, make return thereof and pay the tax to the tax commission, reporting such tax on the forms to be prescribed by the tax commission.

"(3) Every such corporation hereby made liable for such tax, shall deduct the amount of such tax from the dividends so declared.

"(4) In the case of corporations doing business within and without the state of Wisconsin, such tax shall apply only to dividends declared and paid out of income derived from business transacted and property located within the state of Wisconsin. The amount of income attributable to this state shall be computed in accordance with the provisions of chapter 71. In the absence of proof to the contrary, such dividends shall be presumed to have been paid out of earnings of such corporation attributable to Wisconsin under the

provisions of chapter 71, for the year immediately preceding the payment of such dividend. If a corporation had a loss for the year prior to the payment of the dividend, the tax commission shall upon application, determine the portion of such dividend paid out of corporate surplus and undivided profits derived from business transacted and property located within the state.

"(5) Dividends paid by a subsidiary corporation to its parent shall not be subject to the tax herein imposed provided that the subsidiary and its parent report their income for taxation under the provisions of chapter 71 on a consolidated income return basis, or both corporations report separately.

"(6) The provisions of this section shall not apply to dividends declared and paid by a Wisconsin corporation out of its income which it has reported for taxation under the provisions of chapter 71, to the extent that the business of such corporation consists in the receipts of dividends from which a privilege dividend tax has been deducted and withheld and the distribution thereof to its stockholders.

"(7) For the purposes of this section, dividends shall be defined as in section 71.02, except that the tax herein imposed shall not apply to stock dividends or liquidating dividends.

"(8) The tax hereby levied, if not paid within the time herein provided, shall become delinquent and when delinquent shall be subject to a penalty of two per cent on the amount of the tax and interest at the rate of one-half per cent per month until paid.

"(9) The tax hereby imposed shall, when collected by the tax commission, be paid by it into the state treasury.

"(10) Except as they are inconsistent with this section, the provisions of paragraph (b) of subsection (3) of section 71.06, sections 71.10 to 71.17, inclusive, subsection (3) of section 71.18, and sections 71.36 and 71.37 of the statutes shall apply to the tax imposed by this section, but the discount provisions

of paragraph (c) of subsection (3) of section 71.10 shall not apply.

"Section 4. SEPARABILITY CLAUSE. If any section, subsection, paragraph, provision or part of this act, or its application to any person or circumstance shall be held unconstitutional, such decision shall not affect the constitutionality of any other section, subsection, paragraph, provision or part, or its application to other persons or circumstances."

While originally this tax was operative only to July 1, 1937, it has been subsequently re-enacted in 1937, 1939, 1941 and 1943 by the following Acts of the Wisconsin legislature and is now operative:

(1) Section 37, Chapter 309 of the Laws of Wisconsin of 1937 (enacted and effective on its publication June 30, 1937) extended its operation to July 1, 1939.

(2) Section 1 of Chapter 198 of the Laws of Wisconsin of 1939 (enacted and effective on its publication on June 30, 1939) extended its operation to July 1, 1941, and also increased the rate from 2½% to 3% thereafter.

(3) Section 3 of Chapter 63 of the Laws of Wisconsin of 1941 (enacted and effective upon its publication April 30, 1941) extended its operation to July 1, 1943.

(4) Section 2 of Chapter 367 of the Laws of Wisconsin of 1943 (enacted and effective on its publication June 30, 1943) extended its operation to July 1, 1945 and also changed the purpose for which such taxes shall be used from general state expenditure, providing:

"• • • rehabilitation for returning veterans of World War II, construction of improvements at state institutions and other state property, and postwar public works projects to relieve postwar unemployment."

SUPREME COURT OF THE UNITED STATES.

Nos. 620, 621.—October Term, 1943.

620	International Harvester Company, Appellant, *vs.* Wisconsin Department of Taxation.	Appeals from the Supreme Court of the State of Wisconsin.
621	Minnesota Mining and Manufacturing Company, Appellant, *vs.* Wisconsin Department of Taxation.	

[May 29, 1944.]

Mr. Chief Justice Stone delivered the opinion of the Court.

These cases come here on appeal under § 237(a) of the Judicial Code, 28 U. S. C. § 344(a), from judgments of the Supreme Court of Wisconsin, reviewing and sustaining assessments by appellee, the Wisconsin Department of Taxation, of the Wisconsin Privilege Dividend Tax imposed with respect to appellants, which are foreign corporations doing business in Wisconsin. 243 Wis. 198; 243 Wis. 211. The appellants present again, but in a new aspect, the substance of the question decided in *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435. In that case we sustained the constitutionality, under the due process clause of the Fourteenth Amendment, of the Wisconsin Privilege Dividend Tax, § 3 of Ch. 505 of Wisconsin Laws of 1935 as amended by Ch. 552, Wisconsin Laws of 1935.[1] The tax is imposed with respect to both foreign and domestic corporations doing business within the state "for the privilege of declaring and receiving dividends" out of income derived from property located and business transacted in the state. The payor corporation is required to deduct the tax from the dividends payable to both resident and non-resident stockholders.

Appellants are respectively a New Jersey and a Delaware corporation doing business in Wisconsin. Appellee has assessed the

[1] The statute was re-enacted by § 3 of ch. 309 of Wis. Laws of 1937; § 1 of ch. 198 of Wis. Laws of 1939; § 3 of ch. 63 of Wis. Laws of 1941; and §2 of ch. 367 of Wis. Laws of 1943.

Privilege Dividend Tax with respect to dividends declared and paid by appellant Harvester Company to its stockholders, including non-residents, between December 2, 1935 and October 15, 1937, inclusive, and on dividends similarly declared and paid by appellant Minnesota Mining Company in the years 1936 to 1940, inclusive. In the case of each appellant the tax as assessed was measured by so much of the dividends as were derived from the portion of the corporate surplus attributed by the tax authorities to income earned by the corporation in Wisconsin. The dividends were declared at directors' meetings held outside the state, and the dividend checks were drawn on bank accounts outside the state.

In the *Penney* case we sustained the tax in the case of a Delaware corporation doing business in Wisconsin, but having its principal office in New York, holding its meetings and voting its dividends there, and drawing its dividend checks on New York bank accounts. In considering the incidence of the tax in Wisconsin, which could afford a basis for the taxation there although the declaration and payment of the dividend took place outside the state, this Court pointed out that the practical operation of the tax is to impose an additional tax on corporate earnings within Wisconsin, but to postpone the liability for payment of the tax until such earnings are paid out in dividends, and we added, 311 U. S. at p. 442: "In a word, by its general income tax Wisconsin taxes corporate income that is taken in; by the Privilege Dividend Tax of 1935 Wisconsin superimposed upon this income tax a tax on corporate income that is paid out."

Since our decision in the *Penney* case, the Wisconsin Supreme Court has said, in both the *Penney* case on remand, 238 Wis. 69, 72-73, and in the *International Harvester* case below, 243 Wis. 198, 204-206, that under the Wisconsin constitution, the state has no power to lay an income tax on citizens of other states, who are not doing business in Wisconsin, and that the tax is not on the income of the corporation. And in *Wisconsin Gas Co.* v. *Wisconsin Dept. of Taxation*, 243 Wis. 216; cf. *Blied* v. *Wisconsin Foundry Company*, 243 Wis. 221, the Court held that the burden of the tax is imposed upon the stockholders so that the corporation is not entitled to deduct the privilege tax from gross income as a business expense, in arriving at net taxable income under the state's income tax law. In the *Wisconsin Gas Company* case, *supra*, the Court said, at p. 220-1:

"We are certain of three things: (1) That the burden of the tax is specifically laid upon the stockholder; (2) that the corporation declaring the dividend must deduct the tax from the dividend and may not under any circumstances treat the tax as a necessary expense of doing business [for state income tax purposes]; (3) that the power to levy the tax so construed was authoritatively established in the *Penney* case."

From this, appellants argue that the state court has now conclusively declared that the tax is not on income of the corporation, but only on the stockholders' privilege of receiving dividends, and that it must be deducted from the dividends before their payment to the stockholders. Appellants renew the contentions urged in the *Penney* case that since the declarations of the dividends here in question were made outside the state and the non-resident stockholders received their dividends outside the state, the taxing statute as applied in these cases infringes due process by imposing the tax on stockholders and on activities and objects outside the territory of the State of Wisconsin, and consequently outside its legislative jurisdiction. Compare *Connecticut General Ins. Co.* v. *Johnson*, 303 U. S. 77. To this is added the further argument, not presented in the *Penney* case, that the tax violates the Fourteenth Amendment because retroactively applied to and measured by Wisconsin income which was earned and carried to appellants' surplus accounts before the enactment of the statute.

For present purposes we assume that the statute, by directing deduction of the tax from declared dividends, distributes the tax burden among the stockholders differently than if the corporation had merely paid the tax from its treasury and that the tax is thus, in point of substance, laid upon and paid by the stockholders, some of whom might not bear the burden of the tax at all if, without more, it were paid out of the corporate treasury. This is obviously the case here with respect to the deductions from dividends on appellant Harvester's preferred stock, since normally the economic weight of taxes paid by the corporation would be borne by its common stockholders.

If such is the nature of the tax, a question preliminary to determining its validity is whether appellants have standing to urge here the constitutional objections of their stockholders, who are not parties to the present suits and who alone may be affected adversely by the tax. For appellants are permitted to reimburse themselves for the amounts, which they must pay to the state, by

appropriate deductions from the dividends belonging to the stockholders. Appellants' failure in these cases to make the deductions was by their own choice and not by compulsion of the statute. But as the only way by which appellants can avoid the payment of the tax from their own funds is by collecting it from their stockholders' dividends and as appellants would remain liable to the stockholders, certainly to the preferred stockholders, for the amounts to the deductions if not lawfully taken, they are, in either aspect, adversely affected by obedience to the statute, if it is unconstitutional. We therefore conclude that appellants have standing to challenge the constitutionality of the statute. Cf. *Anderson National Bank* v. *Luckett*, 321 U. S. 233, 242-3.

For the reasons stated in the *Penney* case we do not doubt that a state has constitutional power to make a levy upon a corporation, measured by so much of its earnings from within the state as it distributes in dividends, and to make the taxable event the corporation's relinquishment of the earnings to its stockholders. That power is not diminished or altered by the fact that the state courts, for purposes of their own, denominate the levy a tax on the privilege of declaring and receiving dividends, or that they decline to call it an income tax. In determining whether a tax is within the state's constitutional power, we look to the incidence of the tax and its practical operation, and not its characterization by state courts. *Shaffer* v. *Carter*, 252 U. S. 37, 55 and cases cited; *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 280 and cases cited.

Nor do we perceive any constitutional obstacle either to the state's distributing the burden of the tax ratably among the stockholders, as the ultimate beneficiaries of the corporation's activities within the state, and of the state's relinquishment of control over the Wisconsin earnings, so as to render the tax *pro tanto* one on the stockholders' income, or to the state's imposing on the corporation the duty of acting as its agent for the collection of the tax, by requiring deduction of the tax from earnings distributed as dividends.

The power to tax the corporation's earnings includes the power to postpone the tax until the distribution of those earnings, and to measure it by the amounts distributed. Compare *Curry* v. *McCanless*, 307 U. S. 357, 370. In taxing such distributions, Wisconsin may impose the burden of the tax either upon the corporation or upon the stockholders who derive the ultimate benefit

from the corporation's Wisconsin activities. Personal presence within the state of the stockholder-taxpayers is not essential to the constitutional levy of a tax taken out of so much of the corporation's Wisconsin earnings as is distributed to them. A state may tax such part of the income of a non-resident as is fairly attributable either to property located in the state or to events or transactions which, occurring there, are subject to state regulation and which are within the protection of the state and entitled to the numerous other benefits which it confers. Compare *Shaffer* v. *Carter, supra,* and *Travis* v. *Yale & Towne Mfg. Co.,* 252 U. S. 60, with *Lawrence* v. *State Tax Commission, supra,* and *New York ex rel. Cohn* v. *Graves,* 300 U. S. 308. And the privilege of receiving dividends derived from corporate activities within the state can have no greater immunity than the privilege of receiving any other income from sources located there.

We think that Wisconsin may constitutionally tax the Wisconsin earnings distributed as dividends to the stockholders. It has afforded protection and benefits to appellant's corporate activities and transactions within the state. These activities have given rise to the dividend income of appellants' stockholders and this income fairly measures the benefits they have derived from these Wisconsin activities. There is no contention here that the formula of apportionment does not fairly reflect the proper proportion of appellants' earnings attributable to their Wisconsin activities and transactions. Wisconsin may impose a measure of control upon the corporation there with respect to its withdrawal of its earnings from the state, and also may, for the protection of the interests of the state and of its citizens, regulate to some extent the declaration and distribution of dividends by a foreign corporation, certainly with respect to its Wisconsin earnings. See, e.g., Judge Cardozo in *German-American Coffee Co.* v. *Diehl,* 216 N. Y. 57; New York Stock Corporation Law, § 111. The earnings in Wisconsin, their withdrawal from Wisconsin and their distribution in the form of dividends have resulted in the receipt of income by the stockholder-taxpayers and it is Wisconsin's relation to all which permits it to levy the tax. It may condition the privilege of earning and disposing of the Wisconsin earnings upon the payment of a tax measured by and collected from the earnings to be distributed as dividends. *Wisconsin* v. *J. C. Penney Co., supra.*

The facts that Wisconsin cannot prevent the withdrawal of the earnings from the state or the declaration of the dividends, if they be the facts, have no bearing on its right to measure, in terms of taxes, both the benefits which it has conferred on the stockholders in their relations with the state, and the activities or transactions which are within the reach of its regulatory power. *Equitable Life Society* v. *Pennsylvania*, 238 U. S. 143, 147; cf. Mr. Justice Holmes dissenting in *Compania de Tabacos* v. *Collector*, 275 U. S. 87, 99, 100.

That the distribution of Wisconsin earnings was effected by the exercise outside Wisconsin of the power to declare dividends does not deprive it of its power to take toll from the income earned there upon its distribution to the stockholders. See *Bullen* v. *Wisconsin*, 240 U. S. 625; *Curry* v. *McCanless*, *supra*, 366-370 and cases cited; *Graves* v. *Elliott*, 307 U. S. 383; *State Tax Commission* v. *Aldrich*, 316 U. S. 174, 180. And the fact that the stockholder-taxpayers never enter Wisconsin and are not represented in the Wisconsin legislature[2] cannot deprive it of its jurisdiction to tax. It has never been thought that residence within a state or country is a *sine qua non* of the power to tax. Cf. *Cook* v. *Tait*, 265 U. S. 47. So long as the earnings actually arise there, and their withdrawal from the state and ultimate distribution, in whole or in part, to stockholders are subject to some state control, the conditions of state power to tax are satisfied, see *Shaffer* v. *Carter*, *supra*, 55; *State Tax Commission* v. *Aldrich*, *supra*; compare *McCulloch* v. *Maryland*, 4 Wheat. 316, 429, even though some practically effective device be necessary in order to enable the state to collect its tax—here by imposing on the corporation the duty to withhold the tax on so much of the earnings withdrawn from the state as may be distributed in dividends. Imposition of this requirement on the corporation transgresses no constitutional limitations. *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359, 364; *Nelson* v. *Montgomery Ward & Co.*, 312 U. S. 373.

Appellants press with vigor, as controlling decision here, the denial of the state's power to tax in *Connecticut General Ins. Co.*

[2] The Wisconsin Privilege Dividend Tax does not discriminate against non-residents or foreign corporations, or place an undue burden on them without a corresponding burden on residents or domestic corporations. Hence this is not a case where "legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state". See South Carolina Highway Dept. v. Barnwell Bros., 303 U. S. 117, 184-5, n. 2 and cases cited.

v. *Johnson, supra.* In that case California sought to levy a tax on gross receipts derived from contracts made and to be performed in Connecticut by a Connecticut corporation doing other business in California. But as we said of the *Johnson* case in the *Penney* case, *supra*, 446: "In the precise circumstances presented by the record it was found that the tax neither in its measure nor in its incidence was related to California transactions. Here, on the contrary, the incidence of the tax as well as its measure is tied to the earnings which the State of Wisconsin has made possible, . . ." and both the earnings and their disposition are subject to state control and hence its power to tax.

It should be emphasized once again that the Fourteenth Amendment does not in terms or in effect prohibit unwise taxes, merely because they are unwise, or unfair or burdensome taxes, merely because they are unfair or burdensome. The wisdom or fairness of the tax before us are not matters subject to our control or revision. We are only concerned with the power of the state to lay the tax. The power to tax "is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a state extends, are objects of taxation; . . ." *McCulloch* v. *Maryland, supra*, 429; *Curry* v. *McCanless, supra*, 366.

We conclude that appellants' stockholders can have no constitutional objection to the withholding by Wisconsin of a tax measured by their dividends distributed from Wisconsin earnings.

Appellants do not deny that the dividends are derived from earnings from within the state of Wisconsin, but it is urged that some of them at least were paid from corporate surplus earned and set aside in years before the taxing statute was enacted. But since the taxable event, the distribution of dividends paid from earnings, and the deduction of the tax from them occurred subsequent to the enactment of the taxing statute, no question of its retroactive application is involved.

The contention of appellant, the Harvester Company, that the formula for assessing the tax is not one authorized by the statute is not open to consideration here. The State Supreme Court has construed and applied the statute and by its construction we are bound. *Oklahoma* v. *Wells, Fargo & Co.*, 223 U. S. 298 and *Davis* v. *Wallace*, 257 U. S. 478, on which appellant relies, were cases

coming here from the lower federal courts, in which this Court was required to place its own construction on a state statute which had not been definitively construed by the state courts.

Affirmed.

Mr. Justice ROBERTS took no part in the consideration or decision of these cases.

Mr. Justice JACKSON, dissenting.

The facts of one of these cases will make clear the grounds upon which I dissent.

The International Harvester Company is incorporated under the laws of New Jersey. Its head business office is in Chicago, Illinois. It has qualified and has been admitted to do business in Wisconsin and in every state in the Union except Nevada. It has sales branches and manufacturing plants in Wisconsin, and in many other states. Proceeds of sales and receipts from operations in Wisconsin and in every other state are sent to the corporation treasury in Chicago and commingled in general funds without segregation or earmarking as to state of origin.

More than 32,000 stockholders are owners of this enterprise. They are domiciled in every state of the Union, less than 2 per cent of them in Wisconsin. Under the corporation's charter and the applicable law of New Jersey the stockholders may be paid dividends only from its surplus or net profits. Every corporate act connected with payment of dividends takes place in Chicago. There the directors meet to declare them, there the checks are drawn and mailed. They are paid out of the corporation's general funds on deposit in Chicago or New York.

In 1935 Wisconsin enacted a "Privilege Dividend Tax." It provides, with exceptions not material:

"Section 3. Privilege Dividend Tax. (1) For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state, there is hereby imposed a tax equal to 3 per cent of the amount of such dividends declared and paid by all corporations (foreign and local). . . . Such tax shall be deducted and withheld from such dividends payable to residents and nonresidents by the payor corporation.

"(3) Every such corporation hereby made liable for such tax, shall deduct the amount of such tax from the dividends so declared.

"(4) In the case of corporations doing business within and without the state of Wisconsin, such tax shall apply only to dividends declared and paid out of income derived from business transacted and property located within the state of Wisconsin. . . ." Wis. Stat. (1941) § 71.60.

Under this last provision the State by formula not now important apportions among the states the surplus from which dividends may be paid and thus determines a proportion of the dividend attributable to earnings in Wisconsin. As applied and sustained in this case, the short of the matter is this: Wisconsin says it may tax 32,000 stockholders, 98 per cent of whom reside in other states. It taxes them when and because they receive a dividend from a corporation not in its internal affairs subject to its laws, by acts not one of which is performed within its borders.

After the Supreme Court of Wisconsin held this tax invalid it was reinstated by this Court. *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435. This was done on the theory that the tax was not what Wisconsin called it but was in substance an income tax on the corporation, deferred until the income was distributed and measured by the amount of the distribution. As so interpreted, it was the federal undistributed profits tax in reverse; it was a distributed profits tax. But the Wisconsin court has respectfully but firmly insisted that it knows whom Wisconsin is taxing and why. It says this is not an income tax, that it is no tax on the corporation, but is a tax on the stockholder when and because he receives a dividend.

I think the parties are entitled to have the constitutionality of this far-reaching tax decided on the assumption that it is just what the Wisconsin Legislature and Supreme Court say it is. If we do, the question is whether a state may tax nonresident stockholders for receiving from a foreign corporation a dividend from its surplus or undivided profits merely because some time in the past a portion of the surplus was earned in the state.

We must put out of consideration entirely reasoning by which we sustain state taxation of income of the corporation. These dividends are not and cannot be regarded as income of the corporation within any legal or accounting definition. These surplus funds constituted income once—at the moment of receipt—and

may be counted as income for any period which includes time of receipt. But once received, they became capital funds in the sense that earned surplus becomes capital. When they were distributed they were not income of the corporation. They were its surplus capital funds. Not even the power of this Court can make income of outgo. To speak of "a tax on corporate income that is paid out" is as self-contradictory as to speak of round squares.

These dividends of course are income to the stockholder, and any state with jurisdiction to tax him may tax them as such. But I am unable to agree that having "afforded protection and benefits" to a corporation gives jurisdiction to tax the incomes of all its stockholders. Nor do I think that because the state has once permitted the corporation to do business and make earnings in the state its taxing power follows those earnings into the hands of third persons to whom they may be paid. A dividend when declared becomes a debt of the corporation, enforceable as any other debt. If there is power in Wisconsin, because funds were earned there, to tax the receipt of a dividend, there is no reason why it should not also have power to tax the recipients of corporate funds as wages, salaries, or as payment of any other obligation.

Moreover, the Court itself apparently feels obliged to abandon the income-tax-on-the-corporation theory in order to avoid the objection of retroactivity. In considering this aspect of the tax it shifts to a "taxable event" theory which places the event after the enactment of the statute.

I also find it difficult to accept the statement that there is no "constitutional obstacle either to the state's distributing the burden of the tax ratably among the stockholders . . . or to the state's imposing on the corporation the duty of acting as its agent for the collection of the tax' . . . ." The relations between different classes of stockholders is fixed by the corporate charter. If this is a tax on the corporation, it is clear that its burden falls upon the equity stockholders and upon them alone. I do not think the State of Wisconsin would have the power to provide that the preferred stockholders of a New Jersey corporation, despite provisions of its charter, should assume a part of the equity burden.

As supporting this tax, the opinion of the Court says that Wisconsin may impose upon the corporation "a measure of control

. . . with respect to its withdrawal" of these earnings, and that their "ultimate distribution . . . to stockholders" is "subject to some state control." I do not understand to what reference is made. These earnings lawfully had been added to surplus of a New Jersey corporation, they were represented by funds lawfully transferred to Chicago or New York. From them the corporation made the distribution. What control Wisconsin had over these funds in these circumstances I do not see.

The act in question does not purport to be one for the protection of local creditors against the corporation's illegal payment of dividends as was the act dealt with by Judge Cardozo in *German-American Coffee Co.* v. *Diehl*, 216 N. Y. 57. This act alters the purely internal relations of different classes of stockholders without in the least affecting their relation to creditors.

It is impossible to reconcile the taxable-event theory with the benefit theory for supporting this tax. The taxable event clearly is the payment of the dividend. The right to make such payment is not derived from Wisconsin law. The ability to do so does not depend on Wisconsin earnings. The existence of earnings for the period, or of an accumulated surplus, from Wisconsin earnings alone would not authorize such a dividend. That would depend on net accumulations from all sources and surplus from Wisconsin might be neutralized by losses from operations elsewhere. In such a case it is clear this statute would not even purport to tax, although Wisconsin had extended exactly the same protection to the operations within the state as otherwise. Moreover, if earnings were had in Wisconsin and there were net earnings overall but the corporation should decide to accumulate them, the statute would not purport to lay the Wisconsin tax. These facts make clear that Wisconsin is doing what the Supreme Court of Wisconsin said it was doing. It lays a tax upon the stockholder's dividend. It does not tax the income of the corporation.

I do not see that the way to tax the dividends of nonresident stockholders can be bridged by "some practically effective device" necessary "in order to enable the state to collect its tax—here by imposing on the corporation the duty to withhold the tax." Do we mean that the state may empower or obligate a foreign corporation to collect for it taxes it is without power to collect itself? The physical power to get the money does not seem to me a test of the right to tax. Might does not make right

even in taxation. To hold that what the use of official authority may get the state may keep, and that if it cannot get hold of a nonresident stockholder it may hold the company as hostage for him, is strange constitutional doctrine to me.

Whatever rights Wisconsin has to reach beyond its borders and tax nonresidents every other state has also. One who puts his savings to work in an enterprise of national scope may be subjected to any number of state taxes on his dividends up to forty-eight. Any number up to forty-seven of them may be levied by states in which he never lived, never went, did no individual business, and has no vote. Representation is the ordinary guaranty of fairness in taxation.

I do not think any fact in this case shows jurisdiction in Wisconsin to lay a tax on a privilege she does not grant and could not deny, which is exercised wholly outside of her borders and by those who are not her citizens or her corporate creatures. I see no foundation for the tax Wisconsin has laid and no better foundation for the substitute tax this Court has laid. I would reverse the judgments below.